

1 JoAnn Corson Bacheller
2 Registered Diplomate Reporter
3 Certified Realtime Reporter
4 P. O. Box 1424
5 Billings, Montana 59103-1424
6 406/247-4477 office
7 406/247-7008 fax
8 joann_bacheller@mtd.uscourts.gov
9
10 United States Court Reporter
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

10 UNITED STATES FIDELITY)
11 AND GUARANTY COMPANY,)
12) Nos. CV-04-29-BLG-RFC
13 Plaintiff,) CV-08-29-BLG-RFC
14 and)
15) **VOLUME 9**
16 THE CONTINENTAL INSURANCE) **TRANSCRIPT OF JURY TRIAL**
17 COMPANY,) **AND VERDICT**
18 Plaintiff Intervenor,)
19 vs.)
20)
21 SOCO WEST, INC.,)
22 Defendant.)
23 _____)

**BEFORE THE HONORABLE RICHARD F. CEBULL
CHIEF UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF MONTANA**

James F. Battin United States Courthouse
316 North 26th Street
Billings, Montana 59101
Thursday, March 18, 2010
08:59:07 to 16:26:46

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

APPEARANCES

For the Plaintiff:

MR. ROBERT C. JOHNSON
MR. JOHN I. GROSSBART
MS. WENDY N. ENERSON
Attorneys at Law
8000 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

MR. MARSHAL L. MICKELSON
Attorney at Law
P. O. Box 509
Butte, Montana 59703

For the Plaintiff
Intervenor:

MR. BRIAN W. WALSH
Attorney at Law
Suite 330
555 Mission Street
San Francisco, California 94105

MR. STEVEN M. CRANE
Attorney at Law
Suite 1500
515 South Figueroa Street
Los Angeles, California 90017

MR. MAXON R. DAVIS
Attorney at Law
P. O. Box 2103
Great Falls, Montana 59403

For the Defendant:

MR. CHRISTOPHER L. LYNCH
MR. PAUL A. BANKER
Attorneys at Law
4200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402

MR. LAWRENCE B. COZZENS
Attorney at Law
Suite 104
1643 24th Street West
Billings, Montana 59102

Also present for
graphics display:

MS. JULIANNE ROHM
MR. NEIL BAILEY

	CONTENTS	Volume/Page
1		
2	Volume 1 Proceedings	1/ 16
3	<i>Voir Dire</i> Examination	
4	By the Court	1/ 43
5	By Mr. Cozzens	1/ 101
6	By Mr. Mickelson	1/ 114
7	By Mr. Davis	1/ 131
8	Selection of Jury	1/ 147
9	Instructions to Jury	1/ 150
10	Opening Statement by Mr. Cozzens	1/ 160
11	Opening Statement by Mr. Johnson	1/ 185
12	Opening Statement by Mr. Davis	1/ 200
13	Volume 1 Reporter's Certificate	1/ 251
14	Volume 2 Proceedings	2/ 267
15	Volume 2 Reporter's Certificate	2/ 554
16	Volume 3 Proceedings	3/ 570
17	Volume 3 Reporter's Certificate	3/ 829
18	Volume 4 Proceedings	4/ 845
19	Volume 4 Reporter's Certificate	4/ 1101
20	Volume 5 Proceedings	5/ 1117
21	Defendant Rests	5/ 1334
22	Plaintiffs' Motion for Judgment	5/ 1334
23	Order of Court Reserved	5/ 1337
24	Volume 5 Reporter's Certificate	5/ 1339
25	Volume 6 Proceedings	6/ 1355
	Volume 6 Reporter's Certificate	6/ 1610
	Volume 7 Proceedings	7/ 1626
	Order of Court re: Plaintiffs' Motion for Judgment ..	7/ 1870
	Volume 7 Reporter's Certificate	7/ 1879
	Volume 8 Proceedings	8/ 1895
	Plaintiffs Rest	8/ 1904
	Defendant's Motion for Judgment	8/ 2010
	Order of Court re: Defendant's Motion for Judgment ..	8/ 2018
	Plaintiffs' Motion for Judgment Renewed	8/ 2018
	Order of Court re: Plaintiffs' Motion for Judgment ..	8/ 2018
	Settlement of Instructions	8/ 2019
	Volume 8 Reporter's Certificate	8/ 2072

CONTENTS (Continued)

Volume/Page

Volume 9 Proceedings	9/ 2088
Instructions to Jury	9/ 2092
Closing Argument by Mr. Banker	9/ 2105
Closing Argument by Mr. Johnson	9/ 2137
Closing Argument by Mr. Davis	9/ 2159
Rebuttal Closing Argument by Mr. Banker	9/ 2171
Jury Verdict	9/ 2186
Volume 9 Reporter's Certificate	9/ 2190

REPORTER'S NOTE: "Uh-huh" and "Um-hmm" indicate affirmative responses. "Huh-uh" and "Hm-umm" indicate negative responses.

WITNESSES

For the Defendant:

Volume/Page

Mr. Dennis Allen St. George		
Direct Examination by Mr. Banker	1/	211
Cross-Examination by Mr. Johnson	1/	239
Cross-Examination by Mr. Davis	1/	248
Redirect Examination by Mr. Banker	1/	249
Mr. James Sullivan		
Direct Examination by Mr. Lynch	2/	276
Cross-Examination by Mr. Grossbart	2/	316
Redirect Examination by Mr. Lynch	2/	358
Mr. Richard Allen Colver		
Direct Examination by Mr. Cozzens	2/	367
Cross-Examination by Mr. Johnson	2/	403
Redirect Examination by Mr. Cozzens	2/	484
Mr. Rodney Hallsten		
Direct Examination by Mr. Banker	2/	490
Cross-Examination by Mr. Grossbart	2/	514
Cross-Examination by Mr. Davis	2/	551
Redirect Examination by Mr. Banker	2/	552
Mr. Monte I. Naff		
Direct Examination by Mr. Cozzens	3/	570
Cross-Examination by Mr. Johnson	3/	610
Cross-Examination by Mr. Davis	3/	702
Redirect Examination by Mr. Cozzens	3/	718
Mr. Charles Bender (deposition)		
Examination	3/	738
Mr. Desmond Slater (deposition)		
Examination	3/	763
Mr. Larry Nelson (deposition)		
Examination	3/	802
Mr. Marvin Johnson		
Direct Examination by Mr. Cozzens	4/	846
Cross-Examination by Mr. Johnson	4/	863
Mr. Douglas Johnston		
Direct Examination by Mr. Banker	4/	867
Cross-Examination by Mr. Grossbart	4/	898
Cross-Examination by Mr. Davis	4/	921
Redirect Examination by Mr. Banker	4/	924

WITNESSES (Continued)

For the Defendant:

Volume/Page

Mr. David Warne	
Direct Examination by Mr. Banker	4/ 925
Cross-Examination by Mr. Davis	4/ 953
Redirect Examination by Mr. Banker	4/ 987
Ms. Suzanne Miller	
Direct Examination by Mr. Cozzens	4/ 992
Cross-Examination by Mr. Crane	4/ 1030
Redirect Examination by Mr. Cozzens	4/ 1067
Robert Leslie Powell, Ph.D.	
Direct Examination by Mr. Lynch	4/ 1068
Direct Examination (Continued) by Mr. Lynch	5/ 1118
Cross-Examination by Mr. Grossbart	5/ 1213
Cross-Examination by Mr. Davis	5/ 1301
Redirect Examination by Mr. Lynch	5/ 1319

For the Plaintiffs:

Mr. Marvin Johnson (deposition)	
Examination	6/ 1356
Mr. Ken Kjos (deposition)	
Examination	6/ 1471
Ms. Kristen Kohler Stout	
Direct Examination by Mr. Johnson	6/ 1537
Cross-Examination by Mr. Lynch	6/ 1593
Redirect Examination by Mr. Johnson	6/ 1607
Peter Shanahan, Ph.D.	
Direct Examination by Mr. Grossbart	7/ 1626
Cross-Examination by Mr. Lynch	7/ 1704
Redirect Examination by Mr. Grossbart	7/ 1721
Mr. Richard Brill (deposition)	
Examination	7/ 1728
Yaron M. Sternberg, Ph.D.	
Direct Examination by Mr. Crane	7/ 1774
Cross-Examination by Mr. Lynch	7/ 1805
Redirect Examination by Crane	7/ 1826

WITNESSES (Continued)

For the Plaintiffs:

Volume/Page

Bruce Edwin Dale, Ph.D.

Direct Examination by Mr. Davis 7/ 1831

Cross-Examination by Mr. Lynch 7/ 1862

Redirect Examination by Mr. Davis 7/ 1866

For the Defendant in Rebuttal:

Wayne Martin Grip

Direct Examination by Mr. Lynch 8/ 1905

Cross-Examination by Mr. Johnson 8/ 1954

Redirect Examination by Mr. Lynch 8/ 1995

Robert Leslie Powell, Ph.D.

Direct Examination by Mr. Lynch 8/ 1999

Cross-Examination by Mr. Crane 8/ 2005

EXHIBITS

Exhibit No.	Received Volume/Page
5	09/05/89 Letter to Hol from Johnson FPT/ 56
30	09/11/85 Memo to Managers of All Plants from Q. Dyce FPT/ 56
72	11/04/75 Daily sales report to Bender, Hallsten, Don, Grady, and Naff from Q. Dyce. 2/ 536
90	05/29/86 Sales report 3/ 697
143	02/26/82 Continental General Liability Survey Report form FPT/ 23
231	06/15/00 Letter to USF&G from Whalen FPT/ 24
234	09/25/00 Letter to Downing from Mielenhausen FPT/ 24
352	04/08/74 Memo to Bender from Whaley FPT/ 28
353	09/27/72 Memo to Murray from Q. Dyce FPT/ 57
359	09/11/85 Memo from Q. Dyce FPT/ 28
362	09/13/89 Memo to Q. Dyce from Naff FPT/ 28, 57
366	Warning label for perchloroethylene and instructions on empty container handling and reuse FPT/ 57
382	11/05/92 Montana Department of Health Field Investigation Report 4/ 975
383	07/23/00 Letter to Rowe from Miller FPT/ 29
429	06/09/98 E-mail between Warne and Naff 3/ 668
433	12/16/99 Letter to G. Staarjes from USEPA .. FPT/ 58
436	01/06/99 E-mail between Miller and Warne ... FPT/ 58
442	08/06/96-08/09/00 Containment pit runoff water sampling 4/ 1059
445	03/16/73 USF&G Advertising FPT/ 30

EXHIBITS (Continued)

Exhibit No.	Received Volume/Page
499 11/04/75 Aerial photograph	FPT/ 31
505 02/23/82 Continental General Liability Survey Report	FPT/ 31
784 08/21/95 Handwritten notes	FPT/ 58
785 08/18/95 Memo to Naff, Hilton, Biondo, Gilbert, Akers and Liebling from Simko	FPT/ 58
856A 09/25/89 Versar Inc. Environmental Risk Assessment Survey	FPT/ 32, 58
859 07/24/89 Draft letter to Hol from Johnson ..	FPT/ 59
1104 09/08/05 Letter to O'Reilly from Terp	FPT/ 32
2532 11/1975 Aerial photograph	FPT/ 32
2533 11/04/75 Aerial photograph	FPT/ 32
2545 12/30/05 Bulk Handling and Properties of PPG Chlorinated Solvents: Perchloroethylene, Trichloroethylene, Tri-Ethane	FPT/ 59
2558 04/07/04 Letter to O'Reily from Sullivan ...	2/ 293
3004 08/23/00 Letter to Rowe from Miller	FPT/ 32
3006 08/27/72 Aerial photograph	FPT/ 32
3015 07/1995 HCI Dyce site plan	FPT/ 32
3017 01/1983 Dyce personnel manual	FPT/ 33
3024 10/29/85 Company policy re: hoses	4/ 888
3025 07/02/87 Memo to Dick, Russ, Bob, Kevin, Ivan, John and File from Roger	FPT/ 36
3029 1986-2001 Dyce manager's monthly report	8/ 1896
3043 11/29/99 Lockheed Martin Final Report	1/ 37

EXHIBITS (Continued)

Exhibit No.	Received Volume/Page
3044	12/16/99 USEPA First Request for Information Pursuant to 104(e) FPT/ 37
3045	03/01/00 Dyce Response to First 104(e) Request FPT/ 37
3047	08/23/00 Letter to Naff from Risner & Kercher FPT/ 37
3048	08/23/00 Dyce Supplemental Response to USEPA's Second 104(e) Request FPT/ 37
3049	10/03/00 Maxim Technologies Inc. Site Investigation Report FPT/ 38
3050	06/2003 Tetra Tech EM Inc. Remedial Investigation Report for MDEQ FPT/ 39
3051	07/07/04 Tetra Tech Final Feasibility Study Report for MDEQ FPT/ 39
3052	11/2004 MDEQ/USEPA Proposed Remedial Action Plan for Lockwood Groundwater Solvent Plume Site FPT/ 39
3058	12/2003 Tetra Tech Addendum 01 to the Final Remedial Investigation Report for MDEQ FPT/ 39
3059	08/2005 MDEQ/USEPA Record of Decision for Lockwood Solvent Groundwater Plume Site FPT/ 39
3060	02/28/06 Letter to Terp from Risner & Kercher FPT/ 40
3102	09/16/85 Memo to Colver FPT/ 41
3115	11/25/92 Letter and permit application to Lincoln from Diede FPT/ 42
3174	06/09/00 Letter to Webster from Miller FPT/ 43
3175	06/12/00 Letter to Miller from Webster FPT/ 43
3178	07/25/00 Fax to Stevenson from Miller FPT/ 43

EXHIBITS (Continued)

Exhibit No.	Received Volume/Page
3191	11/13/03 ATC Associates Inc. Soil and Groundwater Data Remedial Design Investigation Report FPT/ 43
3200	Compilation: USF&G Policy No. SMP326188 ... FPT/ 44
3201	Compilation: USF&G Policy No. 1CC599480 ... FPT/ 44
3202	Compilation: USF&G Policy No. SMP406309 ... FPT/ 44
3203	Compilation: USF&G Policy No. 1CC944574 ... FPT/ 44
3204	Compilation: USF&G Policy No. CEP64280 FPT/ 44
3205	Compilation: USF&G Policy No. 1CC945882 ... FPT/ 44
3206	Compilation: USF&G Policy No. CEP64348 FPT/ 44
3207	Compilation: USF&G Policy No. SMP535107 ... FPT/ 44
3208	Compilation: USF&G Policy No. SMP576121 ... FPT/ 44
3209	Compilation: USF&G Policy No. 1CCA31253 ... FPT/ 44
3210	Compilation: USF&G Policy No. CEP84958 FPT/ 44
3211	Compilation: USF&G Policy No. SMP594660 ... FPT/ 44
3213	Compilation: USF&G Policy No. CEP104806 ... FPT/ 44
3214	Compilation: USF&G Policy No. SMP654057 ... FPT/ 44
3216	Compilation: USF&G Policy No. CEP114516 ... FPT/ 44
3217	Compilation: USF&G Policy No. SMP772986 ... FPT/ 44
3219	Compilation: USF&G Policy No. CEP114641 ... FPT/ 44
3220	03/03/06 Stipulation as to Existence and Content of USF&G Insurance Policies FPT/ 44
3287	02/28/05 Letter to Terp from Risner & Kercher FPT/ 48

EXHIBITS (Continued)

Exhibit No.	Received Volume/Page
3321	03/03/06 Stipulation as to Existence and Content of Continental Insurance Policies and Exhibits FPT/ 49
3363	09/29/89 Agreement to Purchase Real Property 8/ 1903
3407	1971 Chemical Safety Data Sheet for perchloroethylene FPT/ 49, 61
3408	1972 Hooker Chemical MSDS for trichloroethylene FPT/ 49
3410	1980 PPG manual FPT/ 50
3420	05/25/00 Second Request for Information Pursuant to Section 104 of CERCLA for the Lockwood Solvent Site Billings 3/ 676
3433	1983 Dyce brochure FPT/ 50
3436	11/1979 Ledger sheet 3/ 622
3438	04/1971 Perchloroethylene brochure FPT/ 50, 61
3471	08/05/85 Sales report 3/ 591
3475	02/06/84 Dyce policies re: DOT FPT/ 50
3476	06/02/79 Expense Report 3/ 585
3483	Aerial photograph FPT/ 51
3484	Aerial photograph FPT/ 51
3485	Aerial photograph FPT/ 51
3486	Aerial photograph FPT/ 51
3487	Aerial photograph FPT/ 51
3488	Aerial photograph FPT/ 51
3490	1972 Aerial photograph FPT/ 51

EXHIBITS (Continued)

Exhibit No.	Received Volume/Page
3491 1981 Aerial photograph	FPT/ 51
3492 1987 Aerial photograph	FPT/ 51
3660 09/09/09 Dale photographs	2/ 318
3674 Site photographs taken by Hargis	8/ 2040
3800 05/27/57 Aerial photograph	FPT/ 52
3801 06/26/66 Aerial photograph	FPT/ 52
3802 05/22/69 Aerial photograph	FPT/ 52
3803 08/18/71 Aerial photograph	FPT/ 52
3804 04/23/72 Aerial photograph	FPT/ 52
3805 Circa 1973 Aerial photograph	FPT/ 52
3806 06/18/74 Aerial photograph	FPT/ 52
3807 11/04/75 Aerial photograph	FPT/ 52
3808 06/23/77 Aerial photograph	FPT/ 52
3809 09/06/77 Aerial photograph	FPT/ 52
3810 05/03/79 Aerial photograph	FPT/ 52
3811 05/14/79 Aerial photograph	FPT/ 52
3812 07/31/79 Aerial photograph	FPT/ 52
3813 03/13/81 Aerial photograph	FPT/ 52
3814 06/02/81 Aerial photograph	FPT/ 52
3815 08/24/81 Aerial photograph	FPT/ 52
3816 05/27/83 Aerial photograph	FPT/ 52
3817 07/27/83 Aerial photograph	FPT/ 52
3818 04/30/87 Aerial photograph	FPT/ 52

EXHIBITS (Continued)

Exhibit No.	Received Volume/Page
3826	08/08/05 Response to 06/24/05 CERCLA 104(e). FPT/ 53
3827	02/14/05 Letter to Moskowitz from Mielenhausen FPT/ 53
3828	02/15/05 Letter to Walsh from Mielenhausen . FPT/ 53
3886	06/15/00 Letter to Continental from Whalen . FPT/ 55
3887	09/25/00 Letter to Giblin from Mielenhausen. FPT/ 55
3888	01/08/07 Second stipulation as to existence and content of USF&G insurance policies FPT/ 55
4027	Aerial photograph (D032604) 4/ 848
4032	10/10/00 Communication to Gilbert from Simko 3/ 691
4039	09/13/89 Memo to Q. Dyce from Hallsten 8/ 1903
4044	07/1976 Location Survey of Dyce site FPT/ 62
4087	01/06/99 E-mail to Warne from Hallsten 2/ 547
4089	02/29/00 E-mail to Naff from Warne 4/ 1066
4143	Aerial photograph 6/ 1485
4320	1980 Bulk Handling and Properties of PPG Chlorinated Solvents FPT/ 63
4400	01/14/05 Fax to LeCours from Sullivan 2/ 335
4516	09/12/02 Letter to EPA from Sullivan 2/ 354
4721	08/18/03 Fax to MDEQ from Sullivan 2/ 308
4757	08/03/04 Letter to Sullivan from MDEQ 2/ 313
4811	04/28/03 Letter to Ross from Sullivan 2/ 342
4822	07/20/00 E-mail to Miller from Naff FPT/ 64

EXHIBITS (Continued)

Exhibit No.		Received Volume/Page
4831	Exhibit 5017 aerial photograph with Colver notations	2/ 483
4832	Exhibit 5019 aerial photograph with Colver notations	2/ 483
4833	Exhibit 5024 aerial photograph with Colver notations	2/ 483
4834	Exhibit 5028 aerial photograph with Colver notations	2/ 483
4835	04/30/86 General manager's monthly report ..	4/ 899
5000-5064	Historical photographs	2/ 267

PROCEEDINGS

(Open court.)

(Jury not present.)

THE COURT: Be seated.

All right. What is the problem?

MR. MICKELSON: Your Honor, when we looked at the jury instructions last night, Instruction No. 14, which defines "occurrence," seems a little bit inconsistent with the instructions that come afterwards that tell the jury that they have to find that there is an occurrence, which is, of course, part of the verdict form, but it never says that Soco has the burden to establish an occurrence.

And so the instruction seems a little inconsistent because we just define the terms on 14, but, on the other instructions, such as 15 and 16, we talk about who has the burden with respect to those particular issues in the insurance policy.

MR. COZZENS: Judge, that instruction is included in 15 where it says we have the burden of proving property damage and the definition of "property damage." It includes that it was caused by an occurrence, so it's all there.

THE COURT: On the special verdict form, what is Question No. 1? I don't have the form.

MR. MICKELSON: Was there an occurrence. That's Question No. 1.

1 THE LAW CLERK: (Handing.)

2 MR. MICKELSON: I'm looking at 15, Your Honor. It
3 talks about the burden of proving, preponderance of the
4 evidence, that there was property damage during one or more of
5 the policy periods. It doesn't talk about "occurrence."

6 MR. COZZENS: It says --

7 THE COURT: Where would you suggest? In 16?

8 MR. MICKELSON: In 14, Your Honor.

9 THE COURT: No, I know, but where do you want to add
10 a sentence saying Soco has the burden --

11 MR. MICKELSON: We would suggest in Instruction
12 No. 14 to say, "To obtain insurance coverage under the USF&G
13 and Continental insurance policies, Soco has the burden of
14 proving by a preponderance of evidence that there was an
15 occurrence under the policy."

16 MR. COZZENS: And that's duplicative of what's in
17 Instruction 15 where it specifically says we have the burden
18 of proving property damage, and then it says that property
19 damage is, quote, "loss of use of tangible property that has
20 not been physically injured or destroyed, provided such loss
21 of use is caused by an occurrence during the policy period."
22 It's already there.

23 THE COURT: Well, you know, it really -- I think
24 I'll avoid a question if I put that in there. What's the
25 sentence?

1 MR. MICKELSON: "To obtain insurance coverage under
2 the USF&G and Continental Insurance policies, Soco has the
3 burden of proving" --

4 THE COURT: Well, let's see.

5 MR. MICKELSON: Pardon?

6 THE COURT: I'm just going to say, "To obtain
7 insurance coverage" --

8 MR. MICKELSON: -- "Soco has the burden of proving
9 by a preponderance of the evidence that there was an
10 occurrence under the policy."

11 MR. COZZENS: And where is that being added?

12 MR. MICKELSON: The last sentence of Instruction
13 No. 14 is where we would suggest it.

14 THE COURT: I will just start a new paragraph on
15 14 --

16 MR. MICKELSON: Yes.

17 THE COURT: -- at the bottom of No. 14. "To obtain
18 insurance coverage, Soco has the burden of proving by a
19 preponderance of the evidence that" . . .

20 That?

21 MR. MICKELSON: Oh. Oh, I'm sorry -- "that there
22 was an occurrence under the terms of the policy."

23 MR. DAVIS: "Policies."

24 MR. MICKELSON: "Policies."

25 THE COURT: How about saying "there was an

1 occurrence as defined in the policies"?

2 MR. JOHNSON: Okay.

3 MR. MICKELSON: That would be fine.

4 THE COURT: Does Soco object?

5 MR. COZZENS: Yes, just because it's duplicative.

6 THE COURT: All right. It's overruled. We'll get
7 this new one in there, and then we'll start.

8 What I intend to do is read the instructions. You
9 guys give your first portion. I have a clock up there that I
10 push. I'll be keeping time. And then we'll take a break.
11 We'll start up, you all make your closing argument, you finish
12 yours, and then --

13 MR. JOHNSON: Your Honor, Mr. Davis graciously
14 agreed, if I buy him a beer, that maybe I could have a little
15 more than half, so if I run too long, Mr. Grossbart is going
16 to let me know.

17 THE COURT: Yeah, I'll give you any kind of warning
18 you want.

19 MR. DAVIS: Give him a warning at five minutes.
20 Before he gets warmed up.

21 THE COURT: Five minutes before the end?

22 MR. DAVIS: No, five minutes from the beginning.
23 Tell him he's about out of time.

24 MR. JOHNSON: No, we don't -- Mr. Grossbart will
25 take care of it, Your Honor.

1 MR. DAVIS: No, that will be fine, Your Honor.

2 MR. GROSSBART: It won't be more than an hour,
3 total.

4 THE COURT: Yeah. I know it won't.

5 (Recess taken from 09:04:51 to 09:10:54.)

6 (Open court.)

7 (Jury not present.)

8 THE COURT: And I did look for gold stars to give
9 you guys, as you were talking about, for getting this done and
10 for agreeing on a verdict form, but I didn't find any. But,
11 you know, the record shows that I certainly would have given
12 you one.

13 MR. COZZENS: Would you have placed them on our
14 forehead, Judge?

15 THE COURT: Yes.

16 (Jury present.)

17 THE COURT: Please be seated.

18 I hope the applause that we heard was a positive
19 statement. Wasn't that applause?

20 THE CLERK: It was.

21 (Jurors nodded heads affirmatively.)

22 THE COURT: All right.

23 Members of the jury, now that you've heard all of
24 the evidence, it is my duty to instruct you on the law which
25 applies to this case. A copy of these instructions will be

1 available in the jury room for you to consult if you find it
2 necessary. There will be more than one copy for you.

3 (Discussion off the record.)

4 THE COURT: It's your duty to find the facts from
5 all of the evidence in the case. To those facts, you will
6 apply the law as I give it to you. You must follow the law as
7 I give it to you whether you agree with it or not. You must
8 not be influenced by any personal likes or dislikes, opinions,
9 prejudices, or sympathy. That means you must decide the case
10 solely on the evidence before you. You will recall that you
11 took an oath promising to do so at the beginning of the case.

12 In following my instructions, you must follow all of
13 them and not single out some and ignore others. They are all
14 equally important. You must not read into these instructions
15 or into anything the Court may have said or done any
16 suggestion as to what verdict you should return. That is a
17 matter entirely up to you.

18 The evidence from which you are to decide what the
19 facts are consists of:

20 No. 1, the sworn testimony of any witness;

21 No. 2, the exhibits which have been received into
22 evidence; and

23 No. 3, any facts to which the lawyers have agreed or
24 stipulated.

25 In reaching your verdict, you may consider only the

1 testimony and exhibits received into evidence. Certain things
2 are not evidence, and you may not consider them in deciding
3 what the facts are. I will list them for you:

4 No. 1. Arguments and statements by lawyers are not
5 evidence. The lawyers are not witnesses. What they have said
6 in their opening statements, will say in their closing
7 arguments, and at other times is intended to help you
8 interpret the evidence, but it is not evidence. If the facts
9 as you remember them differ from the way the lawyers have
10 stated them, your memory of them controls.

11 No. 2. Questions and objections by lawyers are not
12 evidence. Attorneys have a duty to their clients to object
13 when they believe a question is improper under the rules of
14 evidence. You should not be influenced by the objection or by
15 the Court's ruling on it.

16 No. 3. Some testimony and exhibits have been
17 received only for a limited purpose. Where I have given a
18 limiting instruction, you must follow it.

19 No. 4. Anything you may have seen or heard when the
20 court was not in session is not evidence. You are to decide
21 the case solely on the evidence received at the trial.

22 The burden of proof discussed in these instructions
23 is by a preponderance of the evidence. When a party has the
24 burden of proof on any claim or affirmative defense by a
25 preponderance of the evidence, it means you must be persuaded

1 by the evidence that the claim or affirmative defense is more
2 probably true than not true.

3 You should base your decision on all of the
4 evidence, regardless of which party presented it.

5 Evidence may be direct or circumstantial. Direct
6 evidence is direct proof of a fact, such as testimony by a
7 witness about what the witness personally saw or heard or did.
8 Circumstantial evidence is proof of one or more facts from
9 which you could find another fact. You should consider both
10 kinds of evidence. The law makes no distinction between the
11 weight to be given to either direct or circumstantial
12 evidence. It is for you to decide how much weight to give to
13 any evidence.

14 In deciding the facts in this case, you may have to
15 decide which testimony to believe and which testimony not to
16 believe. You may believe everything a witness says, or part
17 of it, or none of it.

18 In considering the testimony of any witness, you may
19 take into account:

20 No. 1, the opportunity and ability of the witness to
21 see or hear or know the things testified to;

22 No. 2, the witness's memory;

23 No. 3, the witness's manner while testifying;

24 No. 4, the witness's interest in the outcome of the
25 case and any bias or prejudice;

1 No. 5, whether other evidence contradicted the
2 witness's testimony;

3 No. 6, the reasonableness of the witness's testimony
4 in light of all the evidence; and

5 No. 7, any other factors that bear on believability.

6 The weight of the evidence as to a fact does not
7 necessarily depend on the number of witnesses who testify.

8 The parties in this action are corporations, and, as
9 such, can only act -- can act only through natural persons as
10 their agents or employees. Any act or failure to act of an
11 employee while acting within the scope of his or her authority
12 or employment is in law considered to be the act or failure to
13 act of the corporation or company. In other words, if an
14 employee acts or fails to act while doing things that he or
15 she had the authority to do for the corporation or while doing
16 things which it is his or her job to do, the act or failure to
17 act is considered to be the act or failure to act of the
18 corporation.

19 Knowledge of an officer or employee is in law is
20 considered to be the knowledge of the corporation.

21 You have heard testimony from persons who, because
22 of education or experience, are permitted to state opinions
23 and the reasons for those opinions.

24 Opinion testimony should be judged just like any
25 other testimony. You may accept it or reject it and give it

1 as much weight as you think it deserves, considering the
2 witness's education and experience, the reasons given for the
3 opinion, and all the other evidence in the case.

4 Certain charts and summaries have been received into
5 evidence to illustrate information brought out in the trial.
6 Charts and summaries are only as good as the underlying
7 evidence that supports them. You should, therefore, give them
8 only such weight as you think the underlying evidence
9 deserves.

10 All parties are equal before the law, and a
11 corporation is entitled to the same fair and conscientious
12 consideration by you as any party.

13 Although there are two insurance companies who are
14 parties in this case, USF&G and Continental, you should decide
15 the case as to each insurance company separately. What that
16 means in this case is that Soco must prove that it is entitled
17 to insurance coverage separately under the USF&G policies and
18 separately under the Continental policies. Furthermore, USF&G
19 and Continental are entitled to separate consideration of
20 their respective defenses to Soco's claims for coverage under
21 the insurance policies that USF&G and Continental issued.

22 Unless otherwise stated, all instructions given you
23 govern the case as to each insurance company.

24 You should decide the case as to each party
25 separately. Unless otherwise stated, the instructions apply

1 to all parties.

2 Soco is the successor in interest to predecessor
3 companies that, over the relevant time period of this case,
4 were known as Dyce Sales and Engineering Service Company, Dyce
5 Chemical, Inc., HCI/Dyce Chemical, and Brenntag West, Inc. As
6 the successor in interest to these predecessor companies, Soco
7 is entitled to all of the rights and subject to all of the
8 obligations of these predecessor companies under the policies
9 issued by USF&G and Continental. Soco is also subject to all
10 of the legal liabilities of these predecessor companies. You
11 must view all of the conduct, actions, and statements of these
12 predecessor companies and their employees as if such conduct,
13 actions, and statements were made by Soco directly.

14 The case before you is about whether Soco can prove
15 that a sudden and accidental spill/release of
16 perchloroethylene occurred at its Lockwood, Montana facility
17 in 1975, 1976, 1977, or early 1978 that caused pollution or
18 contamination of the Lockwood solvent Superfund site and
19 whether there is insurance coverage for claims resulting
20 therefrom.

21 You are not going to decide whether or not the
22 pollution or contamination should be cleaned up. That issue
23 is of no concern to you. To the extent it is necessary, the
24 Lockwood solvent Superfund site, including Soco's facility,
25 will be cleaned up regardless of the outcome of this case.

1 This fact should not affect your determination as to Soco's,
2 USF&G's, or Continental's rights or obligations under the
3 insurance policies.

4 The parties, Soco, USF&G, and Continental, are here
5 in court to have you, the jury, decide certain facts that are
6 necessary to resolve the questions that determine whether the
7 insurance policies issued by USF&G and Continental in or after
8 1978 provide coverage.

9 Under each comprehensive-liability insurance policy
10 they sold to Dyce, USF&G and Continental agreed to pay all
11 sums Dyce becomes legally obligated to pay as damages because
12 of property damage to which the insurance applies caused by an
13 occurrence. Each policy defines "property damage" as physical
14 injury to property which occurs during the period of time
15 covered by the policy. Each policy defines "occurrence" as an
16 accident, including continuous or repeated exposure to
17 conditions, which results in property damage neither expected
18 nor intended from the standpoint of the insured.

19 To obtain insurance coverage, Soco has the burden of
20 proving by a preponderance of the evidence that there was an
21 occurrence as defined in the policies.

22 I will now instruct you on the property damage
23 requirement contained in all of the USF&G and Continental
24 policies. To obtain insurance coverage from USF&G, Soco has
25 the burden of proving by a preponderance of the evidence that

1 there was property damage during one or more of the USF&G
2 policy periods. To obtain insurance coverage from
3 Continental, Soco has the burden of proving by a preponderance
4 of the evidence that there was property damage during one or
5 more of the Continental policy periods. The USF&G and
6 Continental policies define "property damage" as (1) physical
7 injury to or destruction of tangible property which occurs
8 during the policy period, including loss of use thereof at any
9 time resulting therefrom, or (2) loss of use of tangible
10 property that has not been physically injured or destroyed
11 provided such loss of use is caused by an occurrence during
12 the policy period.

13 I will now instruct you on the pollution exclusions
14 contained in all of the USF&G and Continental policies. The
15 USF&G and Continental policies exclude coverage for property
16 damage arising out of the discharge, dispersal, release, or
17 escape of smoke, vapors, soot, fumes, acids, alkalis, toxic
18 chemicals, liquids or gases, waste materials or other
19 irritants, contaminants or pollutants into or upon the land,
20 the atmosphere, or any watercourse or body of water, but this
21 exclusion does not apply if such discharge, dispersal,
22 release, or escape is sudden and accidental. Therefore, there
23 is no coverage under the USF&G or Continental policies for
24 property damage caused by Soco's alleged discharge, dispersal,
25 release, or escape of perchloroethylene unless Soco can prove

1 by a preponderance of the evidence that the alleged discharge,
2 dispersal, release, or escape was sudden and accidental.

3 To be sudden, Soco must prove by a preponderance of
4 the evidence that the alleged discharge, dispersal, release,
5 or escape of perchloroethylene was quick or abrupt.

6 To be accidental, Soco must prove by a preponderance
7 of the evidence that the alleged discharge, dispersal,
8 release, or escape of perchloroethylene was unintended and
9 unexpected by Soco West or any of its predecessor companies.

10 Furthermore, Soco must prove by a preponderance of
11 the evidence that the alleged sudden and accidental discharge,
12 dispersal, release, or escape of perchloroethylene involved
13 the discharge, dispersal, release, or escape of
14 perchloroethylene into or upon the land.

15 In order to obtain property damage liability
16 coverage under any USF&G or Continental insurance policy, Soco
17 has the burden of proving that the groundwater damage, if any,
18 which occurred during that policy's time period arose out of a
19 sudden and accidental discharge, dispersal, release, or escape
20 of perchloroethylene.

21 Soco may satisfy its burden by proving that
22 groundwater damage which occurred during a policy period arose
23 out of the sudden and accidental discharge, dispersal,
24 release, or escape of perchloroethylene before that policy
25 period. The phrase "arose out of" means originated from,

1 flowed from, or grew out of.

2 The comprehensive-liability insurance policy's
3 intent is to insure the acts or omissions of Soco or its
4 predecessors, including intentional acts, excluding only those
5 in which the resulting injury is either expected or intended
6 from the standpoint of Soco or its predecessors. Whether the
7 resulting injuries were intended or expected must be measured
8 from the standpoint of Soco or its predecessors.

9 The fact that an act is intentional does not
10 necessarily mean the damage resulting from that act was
11 intended. A person may act intentionally without intending or
12 expecting the consequences of that act.

13 The insurance policies in this case require Soco or
14 its predecessors, in the event of an occurrence as defined in
15 the policy, to provide written notice containing reasonably
16 obtainable information with respect to time, place, and
17 circumstances, and the names and addresses of the injured and
18 of available witnesses to USF&G or Continental as soon as
19 practicable.

20 The phrase "as soon as practicable" means within a
21 reasonable time from the date when a property damage claim
22 against the insured is made or can be reasonably anticipated.

23 USF&G must prove by a preponderance of the evidence
24 that it was materially prejudiced by the time that elapsed
25 between the date when a property damage claim against Soco was

1 made or could be reasonably anticipated and the date Soco
2 provided notice to USF&G.

3 Likewise, Continental must prove by a preponderance
4 of the evidence that it was materially prejudiced by the time
5 that elapsed between the date when a property damage claim
6 against Soco was made or could be reasonably anticipated and
7 the date Soco provided notice to Continental.

8 When you begin your deliberations, you should elect
9 one member of the jury as your foreperson. That person will
10 preside over the deliberations and speak for you here in
11 court.

12 You will then discuss the case with your fellow
13 jurors to reach agreement if you can do so. Your verdict must
14 be unanimous.

15 Each of you must decide the case for yourself, but
16 you should do so only after you have considered all of the
17 evidence, disclosed it fully with the other jurors, and
18 listened to the views of your fellow jurors.

19 Do not be afraid to change your opinion if the
20 discussion persuades you that you should. Do not come to a
21 decision simply because other jurors think it is right.

22 It is important that you attempt to reach a
23 unanimous verdict, but, of course, only if each of you can do
24 so after having made your own conscientious decision. Do not
25 change an honest belief about the weight and effect of the

1 evidence simply to reach a verdict.

2 Some of you have taken notes during the trial.
3 Whether or not you took notes, you should rely on your own
4 memory of what was said. Notes are only to assist your
5 memory. You should not be overly influenced by the notes.

6 If it becomes necessary during your deliberations to
7 communicate with me, you may send a note through the bailiff,
8 signed by your presiding juror or by one or more members of
9 the jury. No member of the jury should ever attempt to
10 communicate with me except by a signed writing, and I will
11 communicate with any member of the jury on anything concerning
12 the case only in writing or here in open court. If you send
13 out a question, I will consult with the parties before
14 answering it, which may take some time. You may continue your
15 deliberations while waiting for the answer to any question.
16 Remember that you are not to tell anyone, including me, how
17 the jury stands, numerically or otherwise, until after you
18 have reached a unanimous verdict or have been discharged. Do
19 not disclose any vote count in any note to the Court.

20 A verdict form has been prepared for you. After you
21 have reached unanimous agreement on a verdict, your presiding
22 juror will fill in the form that has been given to you, sign
23 and date it, and advise the Court that you are ready to return
24 to the courtroom.

25 All right. Soco, you may make the opening portion

1 of your closing argument.

2 That podium, Mr. Banker, will go up.

3 MR. BANKER: Thank you.

4 Well, good morning. You're very nearly done. And
5 for me, this is sort of the fun part of it, to get a chance to
6 talk with you about all of the evidence that you've heard over
7 the last two weeks, and, you know, it's nearly to the point
8 where you get to do the fun part for you, which is to take all
9 of the information that you have gathered and deliberate about
10 what has gone on.

11 You have probably noticed over the last two weeks
12 that we disagree across the middle of the room about what
13 happened here, and it ultimately isn't for us to say what
14 happened. It's ultimately for you to say what happened based
15 on what you saw and what you observed and the evidence that
16 you heard. And that's a fundamental part of our system of
17 justice, is to have a jury of impartial jurors help us to
18 resolve this dispute and tell us what happened.

19 You may have noticed, and when I walked in the
20 courtroom today, I was struck by, you know, all of the binders
21 are gone, all the boxes are gone, the tables are cleared off,
22 and we're really down to, you know, just what you saw and what
23 you remember about the testimony.

24 And I do want to thank you for your time and
25 service. You know, it is a large commitment of time, and it

1 is an important part of what we do here, to have you serve in
2 this capacity. You know, we can't thank you enough for being
3 here.

4 But all of the information that you have heard has
5 led up to this point, and Soco is now able to discuss the
6 evidence with you. But there is a lot to cover, so I ask that
7 you bear with me for, you know, just a little bit longer.

8 The evidence shows -- I'd like to pull up
9 Exhibit 5024, the 1977 photo, which you've seen many times.

10 DOCUMENT TECHNICIAN: (Complied with request.)

11 MR. BANKER: The evidence shows that it is more
12 likely than not that there was a sudden and accidental release
13 of perc in the loading and unloading area, which we've heard
14 so much talk about, which moved down along that ditch that was
15 outside the berm and out into the northwest corner, causing
16 third-party groundwater damage by calendar year 1978 that Soco
17 neither expected nor intended.

18 Now as you heard at the beginning of the week when
19 Mr. Cozzens was talking to you, this is a puzzle. Some of the
20 pieces of that puzzle are missing or lost because of the
21 passage of time and the way people's memories fade over time
22 and become less complete. But that doesn't mean that we can't
23 tell what happened here. We can still see the picture of this
24 puzzle. And let's, before we talk about the pieces of that
25 puzzle, let's consider the frame of the puzzle.

1 This is a case where we have insurance companies
2 versus a local business, and you've heard increasingly -- they
3 haven't come right out and said it, but it's been implicit in
4 a lot of what they've said. They are blatantly accusing us of
5 intentional pollution in order to avoid their contractual
6 obligations. What you're going to be asked to decide is, Was
7 that what happened or not?

8 Now you heard the testimony from lots of employees
9 of this company, and you heard that it was a good company with
10 good people working at it. And some of these witnesses spent
11 nearly their entire career working there. I mean, we're
12 talking 20 and 30 years. They were proud of what they did
13 there. They were proud of the work that they did there.

14 You know, you think about Monte Naff, Dick Colver,
15 Dave Warne, and Rod Hallsten. You've had a chance to see
16 those people come in and talk to you and evaluate their
17 credibility and see what kind of people they were. And if you
18 think about all of the witnesses that came in to testify in
19 court, whether, you know, in person or on video deposition,
20 the one thing that they all agreed about was that this company
21 was conscientious about chemicals hitting the ground.

22 Now it was a chemical distribution company, and
23 there were, you know, occasionally drips and drabs that hit
24 the ground, and there wasn't much that could be done about
25 that, but, by and large, the company was adamant that, you

1 know, those were to be handled as carefully as possible. If
2 chemicals hit the ground, they were to be cleaned up, and all
3 of the precautions that could be taken to avoid, you know,
4 those regularly operational things that happened were to be
5 taken.

6 And you remember -- if we could go to the next
7 exhibit, 143? You remember this Continental inspection report
8 where they said that -- blow that up, second paragraph.

9 DOCUMENT TECHNICIAN: (Complied with request.)

10 MR. BANKER: It says the premises are kept clean.
11 Any chemical spills are immediately cleaned up and disposed of
12 in accordance with EPA regulations. That's Continental, one
13 of the insurance companies in this case, came out to the site
14 in 1982, and that's what they saw.

15 And you heard from Larry Nelson, one of the
16 depositions that we read to you, an underwriting adjuster for
17 USF&G, who said inspectors like him are the eyes and ears of
18 the company, and they wouldn't insure a sloppy company.

19 So all we want here is for the insurers to fulfill
20 their contractual obligation, which, in return for those
21 contractual obligations, they collected premiums from Soco all
22 those years.

23 And if you think back to the first witness in the
24 case -- if we could go to the next exhibit, 3211?

25 DOCUMENT TECHNICIAN: (Complied with request.)

1 MR. BANKER: You saw that USF&G had a policy
2 starting in 1978 and continued on for a number of years, up
3 until the point when we get to Exhibit 3321. You heard about
4 the stipulation that was entered into that defines the terms
5 of the Continental policies from 1982 to 1985. Between 1978
6 and 1985, USF&G and Continental were Soco's insurers.

7 Now there's another concept I want to sketch out
8 before we talk about the specific pieces of the puzzle, and
9 that is, in looking at the next exhibit, Exhibit 3059,
10 page 121, this is a figure from the record of decision. We've
11 seen this a number of times in the case. You've heard that
12 Soco is only seeking coverage for the big green blob out
13 there, the contamination of pure perc in the northwest corner.

14 The other areas that you talked about, that were
15 talked about in this case, in the operations area, the acid
16 tank area, and this small green blob, none of those are
17 important to what's going on in this case. The northwest
18 corner is what Soco is seeking insurance coverage for.

19 Now you see from the plume there that those other
20 three blobs are contributing to the plume that's going to the
21 northwest, but this isn't a question of whether or not those
22 three blobs to the east are contributing to the northwest
23 corner. Everybody agrees there is pure-phase perc down in the
24 northwest corner that has to be cleaned up.

25 And you heard when Dr. Powell was testifying, he

1 said, You know, remember, "I looked at the groundwater flow,
2 and the ratio of what those other three blobs are causing
3 compared to the northwest corner is a ratio of 10 to 1." So
4 the big problem here is the northwest corner, and that's all
5 that Soco is seeking coverage for.

6 Now Soco has brought to you all of the witnesses
7 that had relevant knowledge about this incident that can still
8 testify. And they don't all have the same memories, but
9 that's not all that surprising given that this was more than
10 30 years ago. Some of the witnesses disagree on particular
11 points. But, again, that's not surprising given how long ago
12 this was. But there is, nevertheless, a remarkable
13 consistency between what they remember and what they talk
14 about and what they described, and when you put that all
15 together and you try to reconcile it, they're talking about
16 the same sequence of events.

17 I'd ask you to pay no attention to the distraction
18 and confusion that the insurers have attempted to sow in this
19 case. Think about when we had witnesses on the stand. When
20 Soco was presenting its case in chief and we brought in, for
21 example, Dick Colver, we had Dick Colver on the stand for
22 about 60 minutes, telling his recollection on direct, what he
23 knew about, what he remembered, what he could contribute to
24 this problem. And then we had like a two or three-hour
25 interrogation from the insurers, and they did that again and

1 again with all of our fact witnesses. And ask yourselves,
2 What did they elicit in that interrogation? Did they elicit
3 any useful information, or were they just asking questions for
4 the sake of asking questions?

5 We brought in these witnesses. We had them talk
6 about the relevant time frame of 1975 to 1978. Did they bring
7 in a single witness from that time frame? The only witnesses
8 that they put on in their case in chief were two fact
9 witnesses, were two video depositions from employees who
10 didn't even start until 1987.

11 So Soco was the party that presented to you the
12 people that were there on the ground in the time frame that
13 we're talking about, and we brought them all in.

14 Another thing that I don't want -- and I think you
15 need to ignore is this. You've heard this theme from them in
16 their opening statement about the changing story. Remember
17 the 104(e) report that Suzanne Miller did responding to the
18 EPA? And they've suggested through questioning that, you
19 know, somehow Suzanne Miller wasn't being honest and
20 forthcoming, and somehow Soco wasn't being honest and
21 forthcoming, and that somehow it was an attempt to mislead or
22 confuse the EPA and not take responsibility for this problem.

23 You got a chance to see Suzanne Miller. You got a
24 chance to hear that she understood she was responding under
25 oath to the EPA under penalty of perjury. She had a very

1 short time frame to respond to it. She did the best she could
2 with the available information, and she didn't have a lot of
3 these aerial photographs that we've been looking at over the
4 past two weeks. She didn't have the photo with the green line
5 that was stipulated that we received from the insurers in
6 2004.

7 So back in the 2000 and 2001 time frame when Suzanne
8 Miller was describing this, she was talking to people who had
9 a contemporaneous memory of the property and the layout of the
10 facility which you saw change a number of times over its
11 history. And she did the best she could. She made some
12 mistakes in that report, but we, the people in this room, have
13 been working on this problem for nearly ten years to make the
14 presentation that you've seen today or during these last two
15 weeks of evidence. You know, compare that to what Suzanne
16 Miller was working with. She didn't have access to all that
17 information. She didn't have access to those resources or
18 those people.

19 The two fact witnesses that the insurers called,
20 Mr. Kjos and Mr. Brill, through their depositions, you know,
21 they fall outside the relevant time frame. They don't even
22 start at the facility until the concrete retainment, the three
23 concrete retainment pond facility reconfiguration is done that
24 started -- that was finished in 1987, which is completely
25 different from the historical operations where you had, you

1 know, back before 1981 when they drained the ditch, when the
2 stormwater ditch was outside of containment and was changed
3 again in 1981 to bring it inside of containment and when you
4 had catch ponds.

5 Kjos and Brill -- you know, and what they talk about
6 in terms of, you know, the drum dumping and whatnot, no one is
7 suggesting in this case that drum dumping is an explanation
8 for what happened down in the northwest corner. If it was a
9 drum-dumping situation, you would see a chemical mixture down
10 there. It's not even the relevant time frame. The relevant
11 time frame is really before 1981. It's really the 1975 to
12 1978 time frame.

13 What everyone does agree on -- and this is Soco's
14 experts, this is the insurers' experts, this is the EPA. What
15 everyone does agree -- and I'd like the next exhibit, please,
16 Exhibit DD91.

17 DOCUMENT TECHNICIAN: (Complied with request.)

18 MR. BANKER: Everyone agrees that there is pure perc
19 down in the northwest corner. It doesn't have -- you heard
20 the rich menu of chemicals that are handled at the rest of
21 that site that you see in the operations area where you've got
22 a mixture of different kinds of BTEX chemicals. When you look
23 at the northwest corner, that's all perc. Pure perc. And
24 everybody agrees on that.

25 And everybody agrees that it is more likely than not

1 that it happened before 1987. You heard that from their
2 experts, and you heard, from our experts, an earlier time
3 frame, but after 1987, after that catch pond went away, no one
4 is even suggesting that chemical escaped down to the northwest
5 corner.

6 So if I could have Exhibit 5042?

7 DOCUMENT TECHNICIAN: (Complied with request.)

8 MR. BANKER: This is a 1987 photo. By 1987, the
9 catch pond is gone, and it's been replaced with those three
10 concrete containment pads. So we know it was before 1987.

11 If we could look at the next exhibit, Exhibit 5033?

12 DOCUMENT TECHNICIAN: (Complied with request.)

13 MR. BANKER: This is a 1981 photo. By 1981, the
14 stormwater ditch that used to exist outside containment is now
15 inside containment, and so Soco would take you back even a
16 step further and say that all roads here lead to 1978, that it
17 is more likely than not that what happened here, perc escaping
18 outside of containment and making its way in a pure form to
19 the northwest corner, that happened so that property damage
20 was occurring by 1978.

21 Now I do want to comment on one part of that; you
22 know, property damage. The judge told you at the beginning of
23 the case, in the statement of the case, that there is no
24 dispute that the groundwater contamination that everyone has
25 been talking about here is property damage. So -- and that

1 isn't even a question that you'll be asked to decide, whether
2 or not groundwater damage is property damage. That's just
3 accepted and not disputed by anyone here.

4 Now think back to the beginning of the case when you
5 heard the opening arguments and you got the initial
6 instructions from the Court. The burden of proof is going to
7 be an important concept here, and you've just had instructions
8 about that. The burden of proof that Soco has to satisfy is
9 more likely than not. And I think, you know, you heard the
10 analogy, the scales of justice. In a civil case, the burden
11 of proof starts out -- it's equal, because no one has any
12 particular advantage. To be more likely than not, all Soco
13 has to do is its side is just a little bit heavier than the
14 other side. It is a little more likely than not that Soco's
15 evidence explains this problem.

16 And I also want to comment about circumstantial
17 evidence, because you've heard that -- you know, there are no
18 direct witnesses to this. There are no documents that show
19 this. There are no photographs that show this. And that's
20 all true, but what -- and what we have here is a
21 circumstantial evidence case, but that's not a problem. The
22 Court just told you that circumstantial evidence is as good as
23 direct evidence. And you have -- you know, what the Court
24 just read to you in Instruction 5, there's not a problem with
25 circumstantial evidence so long as the circumstantial evidence

1 persuades you that a particular fact is more likely than not,
2 and we can have a chain of circumstantial evidence. So long
3 as each step of that chain is more likely than not, that's
4 okay.

5 So having framed in the outline of that puzzle,
6 let's consider the pieces of the puzzle.

7 I'd like to turn to Exhibit 5024, back to the 1977
8 photo.

9 DOCUMENT TECHNICIAN: (Complied with request.)

10 MR. BANKER: As I said at the beginning, it is more
11 likely than not that there was a sudden and accidental release
12 of perc in the loading and unloading area which caused
13 groundwater damage by calendar year 1978 that Soco neither
14 expected nor intended. Due to the passing of time, no witness
15 testified that they saw the spill or made a report about it,
16 but that doesn't mean it didn't happen. The one thing
17 everybody agrees about is that down in the northwest corner,
18 there is pure-phase perc, and the question is, How did it get
19 there?

20 Soco is not even arguing that -- you know, you heard
21 when Dr. Dale came in, he said it's impossible for this to
22 have happened without anybody noticing it. That isn't what
23 Soco is saying. What Soco is saying is that no one who has
24 testified here today recalls it or has been able to talk to
25 you about it directly.

1 Now that means either that, you know, someone hasn't
2 been identified, who hasn't been able to come to court today,
3 or someone who has come to court doesn't remember it, but it
4 doesn't mean that -- Soco is not suggesting that this could
5 have happened without anybody noticing it at all, because
6 there are features of it. It would have been a dramatic thing
7 when it happened, but the people who have testified about it
8 here say, "At the time, we were not aware that there had been
9 a spill. We were aware of other features of this. We were
10 aware of an inventory discrepancy." But the fact that no one
11 is able to talk about seeing a spill doesn't mean that no one
12 noticed it. It just means that no one has been able to come
13 here and talk about it 30 years later.

14 Now what are the pieces of the puzzle?

15 The first is the northwest corner. The EPA says
16 that there was a surface release in the northwest corner, and
17 I'd like to have Exhibit DD139.

18 DOCUMENT TECHNICIAN: (Complied with request.)

19 MR. BANKER: Do you remember when Dr. Powell talked
20 about this? This was an MIP boring in the northwest corner,
21 MP-100, and they talked about they took a hydraulic drill and
22 went down and were taking electronic readings as they went,
23 and he said the reason why the northwest corner is uniquely
24 interesting and we know it's an area of surface release of
25 pure-phase perc is because right away we start to get hits on

1 that scale, and it goes all the way down to the bottom, and
2 that looks very different from the other sources that they
3 found on different parts of the site. In particular, it looks
4 very different from the source -- from the MIP boring that
5 they took from the catch pond area where they only found it
6 down near the bedrock.

7 So we know that there's surface release in the
8 northwest corner. And the EPA says that it's a release of
9 approximately 200 gallons. And back in the 1999 Lockheed
10 Martin report, they said, well, it was sometime between -- at
11 least sometime between 1989 and 1984, so that sets an initial
12 time frame for it.

13 But, you know, there are other pieces that we've
14 heard since then that have added more detail to that, and we
15 have a rich understanding than what they had in 1999.

16 We also know that down in the northwest corner, the
17 chemical signature is unique. It shows that it's made up of
18 perc and its breakdown components. It's not everything else
19 that was going on. There is no BTEX down there that is worth
20 talking about.

21 What's down in the northwest corner is 15 times the
22 EPA threshold for saying that there's a pure source of perc
23 that can be detected. And down in the northwest corner, you
24 heard about the three indicators: the soil, the groundwater,
25 and the MIP logs. We hit all three down in the northwest

1 corner. There is no dispute that the northwest corner is pure
2 perc.

3 The second piece of the puzzle that I want to talk
4 about is the pathway. There was a stormwater ditch between
5 the unloading area and the northwest corner between 1975 and
6 1980.

7 And I'd like to see Exhibit 2533.

8 DOCUMENT TECHNICIAN: (Complied with request.)

9 MR. BANKER: Remember, this is the photo, this is
10 the 1975 photo that the parties stipulated that the insurance
11 companies had provided in 2004. This was the first photo that
12 showed, first historic aerial photo that was available that
13 showed this historic ditch going down in the northwest corner
14 in that time frame.

15 Can I have the next frame of that photo?

16 DOCUMENT TECHNICIAN: (Complied with request.)

17 MR. BANKER: Do you remember the green line? The
18 photo came to us with a green line outlined on it. There is
19 really no dispute that there was a stormwater drainage ditch
20 that existed between 1975 and 1980. You've seen it in
21 countless photos. You've seen, heard lots of testimony about
22 it. You've heard experts talk about their being able to
23 observe water in that ditch draining from the
24 loading/unloading area.

25 The pathway also consists of this area, and you've

1 heard testimony about how there was a south berm. You've
2 heard testimony that even if there wasn't a south berm,
3 Mr. Grip was able to see a darkening that would show a
4 darkened area which would provide a pathway to take water out
5 of the unloading area down to the corner, out along the ditch,
6 out to the northwest corner. And you heard testimony from
7 Mr. Colver and Mr. Naff about, you know, that was how the site
8 drained from 1975 to 1980.

9 What's the next piece of the puzzle? The next piece
10 of the puzzle is the loading and unloading area. That is the
11 only place where perc was handled outside of containment, and
12 you heard testimony that perc was transferred through hoses
13 and pumps at approximately 60 gallons a minute.

14 Well, you know, think about how long that is. Sixty
15 gallons a minute, it would take less than nine minutes for
16 500 gallons to be released. Less than five minutes if there
17 was pressure from both sides, like Mr. Colver talked about.
18 If you had a coupling fail in a certain position, you'd get
19 pressure both from the pump as well as from the truck. Well,
20 if someone went to the bathroom or went to smoke a cigarette
21 or went to get a cup of coffee, that's long enough, at
22 60 gallons a minute, for a lot of perc to be released.

23 And you heard a lot about hoses and couplings. I
24 mean, these hoses and couplings were mechanical devices, and
25 they sometimes had problems. You heard Mr. Naff talk about he

1 had a situation, you know, he had a situation where he had a
2 hose rupture, and he said, "I was soaked from top to bottom in
3 chemicals from that." So hoses could rupture. Couplings
4 could fail. And if it happened in the loading and unloading
5 area, you know, chemicals were being transferred at such a
6 rate that a lot of chemical could be released very quickly.

7 What's the next piece of the puzzle? The next piece
8 of the puzzle is that Dyce as a company had policies and
9 procedures in place to minimize the chance of perc hitting the
10 ground. They used drip pans underneath the couplings. When
11 they were connecting up to a truck or they were connecting up
12 to a pump, the quick couplings that you saw, there were drip
13 pans to prevent the little drips and drabs from getting out
14 onto the ground. They used dedicated hoses and pumps to avoid
15 cross-contamination. They had unloading policies. They had
16 reporting policies. And they had spill policies. I mean, you
17 heard about how those policies evolved over time. At first
18 they were oral, and then at some point in the '80s they got
19 written down.

20 If we could turn to Exhibit 3102?

21 DOCUMENT TECHNICIAN: (Complied with request.)

22 MR. BANKER: This was a document that you saw. It
23 was a 1985 company policy that was talking about how to handle
24 spills.

25 And if we could turn to the next page of that

1 exhibit?

2 DOCUMENT TECHNICIAN: (Complied with request.)

3 MR. BANKER: This was the spill and cleanup policy.
4 And down -- if we could blow up the last paragraph there, this
5 was the policy in 1985, and you heard testimony that this was
6 really the policy all along. This hadn't changed. Any spill
7 that we have, whether it is a hazardous material or
8 nonhazardous material, shall be handled to prevent its loss
9 into the environment. So that's where, that's where Dyce was
10 coming from.

11 If we could go to the next page? And blow up the
12 last paragraph.

13 DOCUMENT TECHNICIAN: (Complied with request.)

14 MR. BANKER: It says, "Our policy is that all spills
15 be handled as emergencies and cleaned up as quick as possible
16 so they do not soak into the ground, run into any stream or
17 ditch or water or any kind of sewer."

18 So -- but even though Dyce had these policies, you
19 heard testimony that it was nevertheless possible for truck
20 drivers delivering a bulk load to not always stay with their
21 trucks, and it was possible for Dyce employees, including the
22 temporary employees that they used from time to time, to not
23 always be present at the unloading.

24 So it would have been possible in that time frame
25 for a spill to have occurred without management knowing about

1 it. And you think about the location of the office. You
2 heard about how the office was not, you know, in the loading
3 and unloading area. You heard about the prevailing wind;
4 that, you know, the wind always is blowing. You heard
5 about -- you know, there was a lot of talk about gravel and
6 concrete and asphalt and how, you know, if there was a perc
7 stain that hit concrete, it wouldn't leave any mark. If there
8 was a perc stain that hit asphalt, it might react, but it
9 might look like any other stain of the other chemicals that
10 are being handled at the site.

11 And you have the unloading area at the start of the
12 drainage along the south berm to the stormwater ditch between
13 the railroad track and the west berm. If a release would have
14 happened in the unloading area in between 1975 and 1988, it
15 could have been spilled and gone in minutes.

16 And you heard testimony that employees didn't
17 necessarily report everything despite the policy. I mean, and
18 think about that. You've heard testimony that perc was one of
19 the most expensive chemicals that was handled at the facility.
20 What is someone going to think if they have a -- if they're
21 there -- and you heard sometimes employees were on call by
22 themselves at the facility. If they're there and they have
23 this spill and a coupling fails and 500 gallons of perc
24 escapes and there's no one else around to see it, is that
25 something that's necessarily going to be reported? What would

1 happen to the person that did that? You know, that person
2 might have been concerned about whether or not they would lose
3 their job. That person might have been concerned about, you
4 know, whether there would be consequences to them. And the
5 fact of the matter is, there never was a report of a spill of
6 perc.

7 But then we come to the next piece of the puzzle,
8 the inventory discrepancy.

9 In the same time frame when the pathway existed from
10 the unloading area and the northwest corner, there was a
11 significant inventory discrepancy of perc that was unique in
12 the history of the company. And you heard Mr. Hallsten talk
13 about how he thought that was between 250 to 1,000 gallons.
14 You heard Mr. Naff testify about how he thought that was
15 between 500 to 600 gallons, and you heard Dr. Powell testify
16 that, in his opinion, it would have taken at least 500 gallons
17 released in the unloading area to get down through that ditch,
18 given what you would lose and what would evaporate, to have
19 the amount of chemical in the northwest corner that we find
20 there today.

21 Then we come to the question of, Well, when did that
22 inventory discrepancy happen?

23 And no one can say with absolute certainty. They
24 sketch out a time frame. Mr. Naff starts by saying, you know,
25 he thinks it's 1975, '76, or '77. Excuse me; Mr. Hallsten

1 says 1975, '76, or '77. Mr. Naff says he thinks it could have
2 been in 1975 or 1976. But on cross-examination, when the
3 insurers were asking questions about it, Mr. Naff said it
4 could have been as late as 1977, and Mr. Hallsten said it
5 could have been as late as 1978. So that's, that lays out a
6 general time frame, 1975 to 1978.

7 It isn't going to be important for you to decide
8 exactly when this happened so long as you can find it's more
9 likely than not that this happened by 1978.

10 And actually, when you think about it, why were they
11 able to say 1975 to 1978? Well, the critical testimony on
12 that is it was because Hallsten was on the order desk, but it
13 wasn't the first year he was on the order desk, 1975, when he
14 was training with Monte Naff. So that more or less rules out
15 1975. We're looking at 1976, '77, or '78.

16 But even more specifically, both Hallsten and Naff
17 had a recollection that this was part of the quarterly
18 inventory that was taken, and Mr. Naff recalls, he thinks it
19 was the fourth quarter of one of those years. And
20 Mr. Hallsten says, "I think it was the first quarter of one of
21 those years." Why do they both have that recollection? Well,
22 they both have the recollection because of Quentin Dyce.

23 Quentin Dyce was coming back from Arizona, and
24 whether it was Quentin Dyce coming back from Arizona at
25 Christmastime so that it was a fourth-quarter issue, or

1 whether Quentin Dyce was coming back in the spring so that it
2 was a first-quarter issue, again, that's not really that
3 important.

4 The fact of the matter is we've got two witnesses
5 who worked there in the same time frame who have a
6 recollection of a quarterly inventory discrepancy in the same
7 period of a couple years, off by one quarter from each other.
8 When you try to reconcile that testimony, the way to reconcile
9 that testimony is to ask yourself, Is it more likely than not
10 that it happened by calendar year 1978?

11 And the last piece of the puzzle, and this really
12 isn't disputed, is that if there had been a release of perc in
13 the unloading area that went along the outside of the south
14 berm to the stormwater ditch and wound up in the northwest
15 corner as a surface release, it is undisputed that that would
16 have caused groundwater damage within six months or less, and
17 so long as it's down there, it continues to cause groundwater
18 damage. And you heard that, you know, perc doesn't, doesn't
19 dissolve very well in water. It just sits down there, so it's
20 been down there for a long time, and it is, you know, it's
21 caused a problem ever since it first got there.

22 Now why is all of this important? Well, this is
23 important because of insurance. And think back -- and that's
24 why groundwater damage by 1978 is important. USF&G insured
25 Soco from 1978 to 1981. Continental insured Soco from 1982 to

1 1985.

2 Now I do want to take that, this opportunity, to
3 talk a little bit about one of the issues that you're going to
4 be asked to decide on the verdict form, and that is the
5 question of notice and prejudice.

6 You heard instructions that the policies require
7 notice of an occurrence as soon as practicable, which means
8 within a reasonable time from the date when a property damage
9 against Soco -- property damage claim is made against Soco or
10 can be reasonably anticipated. But you heard Mr. Warne
11 testify that no one ever told him, as the district manager for
12 this facility, that anyone had any problems with the notice
13 that was provided to the insurers, and the notice, you
14 remember from the first witness, Mr. St. George, when we were
15 talking through some of those documents that were put into
16 evidence --

17 MR. JOHNSON: Your Honor, I object to this. I
18 object to this. This goes to an issue that is not for the
19 jury.

20 THE COURT: It's overruled.

21 MR. BANKER: You heard Mr. St. George say, when we
22 were dealing with documents on the first day of testimony,
23 that they provided notice to the insurance company in June of
24 2000. They told the insured that the policy of the company
25 was to tell the insureds about claims that they received

1 within weeks. So you have notice going to USF&G in
2 Exhibit 231 in June of 2000, and you have notice going to
3 Continental in Exhibit 3886.

4 Can we pull up 3886?

5 DOCUMENT TECHNICIAN: (Complied with request.)

6 MR. BANKER: This was a letter that Soco sent to
7 Continental.

8 And if we could pull up Exhibit 231?

9 DOCUMENT TECHNICIAN: (Complied with request.)

10 MR. BANKER: This was a letter that was sent to
11 USF&G in the June 2000 time frame.

12 Now the insurers, on the question of notice, would
13 say, I think, "Well, we're not talking about June of 2000.
14 Why didn't Soco give us notice of this problem back in the
15 1970s?"

16 Well, you've got to think very carefully about that
17 language. Notice of an occurrence, as soon as practicable,
18 means within a reasonable time from the date when a property
19 damage claim against Soco is made or can be reasonably
20 anticipated.

21 Well, you heard Dr. Powell explain that in the
22 1970s, no one was thinking about perc and its danger to
23 groundwater. That just wasn't part of the awareness back
24 then. That changed over time, and certainly today, looking
25 back on it from the year 2010, we look back on it and say,

1 "Well, you know, isn't it obvious to us that, you know, perc
2 was a problem, or any chemical was a problem being released
3 into the environment?" Well, that wasn't obvious back in the
4 1970s before CERCLA and RCRA and all of the federal
5 regulations were passed and put into place. In that time
6 frame, it was a different situation.

7 So ask. When was the first time that Soco knew
8 about a property damage claim that was being made against it?
9 Well, it was the *Weiss* action, or, at the earliest, it was
10 when the EPA said, in the Lockheed Martin 1999 report, that
11 Soco was a potential source of contamination.

12 And even when that happened, you heard Mr. Warne
13 talk about, "We didn't really know how that perc would have
14 gotten down there. We thought at first it might have come
15 from one of the companies that was adjacent to us on the
16 fenceline, because we had no explanation for how perc would
17 have gotten down to the northwest corner in its pure form. We
18 didn't know. It took us years of investigation to come up
19 with that."

20 And you also heard talk from Mr. Warne about it
21 wasn't exactly clear, once they understood what the EPA was
22 looking at and the time frame that the EPA was putting this
23 into, it took some time to figure out who the historical
24 insurers were and research that information so that they could
25 be in a position to have a communication with the insurers.

1 So when a claim actually came in -- the Lockheed
2 Martin report in 1999 was not a claim. The first claim that
3 came in was the *Weiss* action, which was tendered to the
4 insurance companies in June of 2000. The EPA then, later in
5 2000, sent Soco a PRP letter, potentially responsible party
6 letter, which was also forwarded to the insurers, but that was
7 really the first claim that the EPA had made against Soco.

8 But what about the second question? You know, I
9 talked to you about notice a little bit. But what about
10 prejudice? You know, were the insurers prejudiced between the
11 time that Soco knew or reasonably could have anticipated a
12 claim and reported it to its insurers?

13 Well, there is absolutely no evidence of prejudice
14 from the insurers. Now they may talk about, "Well, a lot of
15 time has passed and witnesses have died and documents have
16 gone, you know, gone to where they can't be found." But you
17 didn't have a single witness from these insurance companies
18 who took the stand and testified under oath that somehow they
19 have been prejudiced or materially affected by this. The fact
20 of the matter is, you know, you can draw whatever inference
21 you want from that.

22 MR. COZZENS: Paul, five minutes.

23 MR. BANKER: The prejudice that we're talking about
24 there is the measure of the prejudice between the time that
25 Soco provided -- you know, first could have known or

1 reasonably anticipated a claim. I would submit that's no
2 earlier than 1999 and probably sometime in 2000.

3 So we have the who, what, where, when, and how:

4 Who? A Dyce employee or a truck driver.

5 The what? A large spill of perc.

6 Where? Outside containment in the unloading area.

7 When? '75, '76, '77, or the first part of '78, but,
8 in no event, it was by 1978.

9 How? Most likely during the unloading operation,
10 transferring perc at 60 gallons a minute.

11 And why is all this important? Well, if groundwater
12 contamination happened by 1978 as a result of a sudden and
13 accidental spill, then the insurers' policies respond.

14 And Soco has ruled out other explanations as less
15 likely through the evidence. The perc wasn't stolen. It
16 wasn't intentionally dumped in the northwest corner. It
17 wasn't steam cleaning of barrels or drum dumping or drips and
18 drabs. All of those would result in a mix of chemicals that
19 you don't see down there. And, moreover, there was never any
20 operations or storage down in the northwest corner. So
21 something unusual had to happen that was outside of the
22 ordinary.

23 So what are the insurers arguing? Well, the
24 insurers have put up this theory of a catch pond release. But
25 you've heard lots of testimony that it couldn't have been

1 drained through a pipe. And what pipe am I talking about?

2 I'm talking about Marvin Johnson's pipe. You heard testimony
3 from Dr. Powell that that wouldn't work.

4 If you've got 1,000 gallons of perc, that gives you
5 an inch of perc in the bottom of the catch pond. Marvin
6 Johnson's pipe -- as it went down, didn't get to the bottom of
7 the catch pond necessarily -- would have required such a layer
8 of water on top of it to push it up out of that pipe, there's
9 just no way that could have happened before the water
10 overflowed the berm. But, moreover, everyone else, and I mean
11 Colver, Naff, Johnston, Warne, they all say there wasn't a
12 pipe in the catch pond.

13 I don't know what Marvin Johnson is remembering all
14 these years later, but I know that the other witnesses don't
15 remember it. I know that when you heard Mr. Grip testify,
16 it's not visible in the photos. You can't see this pipe.
17 There's no evidence of this pipe.

18 And remember Doug Johnston? He took the stand after
19 Marvin Johnson said, "He was my supervisor. Doug Johnston
20 told me to go out there and drain that pipe."

21 And I asked Doug Johnston, I said, "Was there a
22 pipe?"

23 He said, "No."

24 "Did you ask Marvin Johnson to drain it?"

25 He said, "No." He said, "The thought sends chills

1 down my spine, because that would have been totally
2 inconsistent with having a catch pond in the first place."

3 There is no evidence of draining or any other
4 mechanism that would have gotten chemical out of that catch
5 pond and into the northwest corner. Any pipe or draining
6 would have resulted in such a mixture of chemicals down there
7 that it just doesn't make sense.

8 And remember that the perc in the catch pond
9 concentration was 10,000 times less than the concentration of
10 perc found in the northwest corner.

11 Now the insurers' experts here have come in ten
12 years after Soco started communicating with the insurance
13 companies and have conjured up an impossible scenario. In
14 order to believe their experts on this -- if the fact
15 witnesses that Soco has brought in are telling the truth, then
16 the scenario they've conjured up is just simply wrong.

17 Dr. Shanahan, their expert on the northwest corner,
18 talks about -- you know, he admits this would have been more
19 likely than not before 1987, but did you hear him say, well,
20 he wasn't concerned about the facts? He didn't read the
21 depositions. The testimony of the factual witnesses wasn't
22 important to him.

23 He spent all of his time talking about everything
24 but the northwest corner, talking about the other areas. But
25 remember when he talked about that red dot that they found

1 underneath one of the concrete containment ponds, and, on
2 cross-examination, Mr. Lynch asked him, "Wouldn't that same
3 mixture that was found at the red dot be what we'd find in the
4 catch pond?" and he said, "Yes"? So you'd have that same
5 mixture of chemicals in the catch pond. If it was released
6 from the catch pond, you would see that same mixture of
7 chemicals down in the northwest corner.

8 Do you remember Ms. Stout and her testimony about
9 how she could see in the shadows where no one else could see?
10 Witnesses testified that there was a berm there. Mr. Grip
11 testified he couldn't see in the shadows except to the extent
12 that there was a drainage depression. But, you know, ask
13 yourself. Is it credible? You've seen the photographs.
14 You've seen the pictures of the berm. You've heard the
15 testimony. Ask yourself. Is that credible?

16 Remember Dr. Sternberg and how he cut the northwest
17 corner into a quarter of its mass before he did his mass
18 calculations?

19 And Professor Dale? He admitted to the most
20 impossible scenarios of all. He even admitted some of the
21 things I'm suggesting are impossible. All the spills happened
22 at once. Released onto completely flat ground. Doesn't
23 react, perc doesn't react to the surface. It evaporates all
24 at once. It hits the asphalt and there's no wind. It's a
25 75-degree day, even though this was a first- or fourth-quarter

1 release.

2 And he got some pictures from a friend who heard
3 something about a perc spill, but he's never seen a perc
4 spill, and he's never even seen a truck unloading. So ask
5 yourself. Is that helpful or credible?

6 I would like to talk with you briefly about the
7 verdict form and the questions that you're going to be asked
8 to answer.

9 The first question, "Was groundwater contamination
10 at or near the Soco facility caused by an occurrence?"

11 Well, you've got a couple of instructions on that.
12 It's Instruction 14 and Instruction 15. I'd submit to you the
13 answer to that question is yes.

14 And, No. 2, "Did groundwater contamination arise out
15 of a 'sudden and accidental' release of perchloroethylene at
16 Soco's Lockwood facility in 1975, 1976, 1977, or early 1978?"
17 I'd submit to you the answer to that is yes, and, on that
18 question, you have Instructions 16 and 17.

19 Question 3, Was the June 2000 notice given to USF&G
20 within a reasonable time after a property damage claim against
21 Soco was made or reasonably anticipated? I'd submit the
22 answer to that is yes.

23 And, No. 4, "Was USF&G prejudiced by the timing of
24 Soco's notice?" The answer there, I think, is no.

25 I'm missing a page. Do you have 5 and 6?

1 THE CLERK: I do (handing).

2 MR. BANKER: No. 5, "Was Soco's June 2000 notice to
3 Continental given within a reasonable time?" This is a mirror
4 image of the USF&G question. Again, the answer there I'd
5 submit is yes.

6 And, No. 6, "Was Continental prejudiced by the
7 timing of Soco's notice?" The answer there is no.

8 So what I'd leave you with is I don't think that
9 there's any credible evidence that explains the pure perc in
10 the northwest corner better than a sudden and accidental
11 release of perc in the unloading area that caused property
12 damage which Soco neither expected nor intended by 1978.

13 Think about those scales of justice. You are the
14 finders of fact in this case. You will decide what is more
15 likely than not using your evaluation of the evidence, the
16 Court's instructions, and your common sense. If you find that
17 Soco has tipped the scales of justice in its favor on the
18 issues that you will decide, you should return a verdict for
19 Soco.

20 Thank you.

21 THE COURT: Thank you.

22 You've used 43 minutes --

23 MR. BANKER: How many?

24 THE COURT: -- to be technical, and 17 seconds, so
25 that means you have about 17 minutes left.

1 Now, ladies and gentlemen, we're going to take our
2 last break. When we come back, the insurers will make their
3 closing arguments, Soco will complete theirs, and then we'll
4 be in recess awaiting your verdict.

5 Let's take a recess.

6 THE LAW CLERK: All rise.

7 (Recess taken from 10:13:21 to 10:26:20.)

8 (Open court.)

9 (Jury present.)

10 THE COURT: Please be seated.

11 Mr. Johnson, you may make your closing argument on
12 behalf of USF&G.

13 MR. JOHNSON: Thank you, Your Honor.

14 Now the first thing I'd like to say is thanks.
15 Thank you for serving on this jury. Thank you for taking time
16 out of your lives, your busy lives, your work, for your
17 service to the court and to the parties in this case. Really
18 the fact that citizens such as yourself will take the time to
19 serve on juries, to resolve disputes between other citizens
20 and corporations makes our legal system very valuable and
21 unique.

22 The insurers filed this case right here in Billings
23 to have a Montana jury, you all, decide whether the companies
24 that we speak for are contractually obligated to reimburse
25 Soco for the amounts that Soco must spend to clean up the

1 pollution that Soco is legally responsible for.

2 We don't believe that we are contractually obligated
3 to pay Soco for its cleanup of the environment. But that
4 decision isn't ours to make. It is up to you. It is your
5 decision to make, and I know that you will make it wisely,
6 considering both the credibility of the testimony that you've
7 heard and your own common sense.

8 Okay. Let me get right to the heart of the case,
9 the alleged spill of hundreds of gallons of perc which
10 purportedly happened, according to Soco's theory of the case,
11 sometime in 1975, 1976, 1977, or early 1978.

12 The policies that Dyce purchased from USF&G and
13 Continental in the late 1970s and early 1980s exclude coverage
14 for pollution. Let me say that again. The policies of
15 insurance that Dyce purchased have pollution exclusions in
16 them that exclude any pollution into the environment with one
17 exception: if the pollution was caused by a discharge that
18 was both sudden and accidental.

19 You already heard the language of the policy which
20 I've just summarized in the instructions, and you'll see the
21 language of the policy when you take the instructions back
22 with you.

23 After all of the evidence presented over the long
24 eight days of trial that we've been here, that's the
25 fundamental issue in this case, whether the spill that Soco

1 theorizes ever really happened.

2 You may recall that in my opening statement, I asked
3 you to pay close attention, to listen during the course of the
4 trial to hear if anyone, anyone at all, testifies that he or
5 she saw a spill of 250 to 1,000 gallons of perc in the 1970s.

6 I promised you, I promised you that you would not
7 hear anyone, anyone at all say that he or she had seen such a
8 spill. That, of course, turned out to be the case. No one
9 has testified that he or she had seen the alleged spill.

10 I also promised you that you would not hear anyone
11 testify that he or she observed the spill with any of their
12 other senses. No one heard it or the shouts of the people
13 that would have clearly been heard if it had happened, and no
14 one smelled it despite the fact that a spill of 250 to
15 1,000 gallons of perc would have clearly had a strong and
16 distinctive odor. And no one saw any evidence of it after it
17 allegedly occurred.

18 No one saw any evidence of it despite the fact that
19 Dr. Bruce Dale, our expert from Michigan State, said that a
20 spill the size of 250 to 1,000 gallons of perchloroethylene
21 would have been a catastrophic nightmare. It would have, it
22 would have amounted to tons of perc spreading out in all
23 directions across the loading area, permanently, permanently
24 damaging the asphalt in that area. Yet no one saw it. No one
25 heard it. No one smelled it, and no one saw any evidence of

1 it after it allegedly occurred.

2 In my opening statement, I asked you to look very
3 closely at the exhibits that Soco offers in this case. I
4 promised you not one document, not a single one, will refer to
5 the alleged spill. And that, of course, is the case. There's
6 not one report, not one letter, not one memo that even
7 mentions the spill or even the possibility of a spill.

8 Ladies and gentlemen, I submit that there is only
9 one question -- only one conclusion that you can draw from all
10 of this. The alleged spill never happened. It is nothing
11 more than a story that Soco came up with to try to get the
12 insurance companies to pay for the cleanup of the
13 environmental mess that Dyce created.

14 Mr. Banker's suggestion a few minutes ago that
15 someone forgot about it is simply implausible. So is his idea
16 that someone knows about it, some Dyce employee knows about it
17 but didn't come in to court to testify about it.

18 When Suzanne Miller was asked and Dyce was asked by
19 the EPA to go out and interview employees and former
20 employees, they talked to, I think, at least 19 different
21 people. Every single one of them denied that such a spill
22 ever occurred.

23 If the alleged spill didn't happen, Soco is simply
24 not entitled to any insurance coverage under the policies that
25 the insurers issued to Dyce.

1 Now we heard about the inventory shortage story.
2 Let me address that for a few minutes. Whatever you think
3 about the story about the inventory shortage, one thing is
4 absolutely clear. There is absolutely no evidence linking the
5 inventory shortage to the alleged spill. Only two witnesses
6 recalled the inventory shortage, Rod Hallsten and Monte Naff,
7 both long-time Dyce employees, but all they did was recall a
8 shortage. They both testified that they don't know what
9 caused the shortage. They both said that the issue as to what
10 caused the shortage was turned over to Quentin Dyce, and they
11 both said they didn't know if the shortage was ever resolved,
12 and they both said they never heard about it again from
13 Mr. Dyce.

14 And, most importantly, neither Hallsten nor Naff
15 testified that the inventory shortage they recalled was the
16 result of a major spill of perc. In fact, like every other
17 Dyce employee who testified in this case and every other Dyce
18 employee who was interviewed for Suzanne Miller's report to
19 the EPA, they both testified that they never saw or even heard
20 about a spill of perc at Dyce.

21 Now let me talk -- let me address a little bit more
22 Mr. Hallsten's testimony. Hallsten started with the company
23 back, I think, in June of 1974 and is still employed by Soco
24 as its branch manager in Utah 36 years later. In the late
25 1990s and the early 2000s, Mr. Hallsten, the documents show,

1 and he admits, was fully aware that EPA was investigating
2 whether the perc contamination in the Lockwood -- in Lockwood
3 came from Dyce's Lockwood plant. But during all that time,
4 during all that investigation, Hallsten never told anybody,
5 never told anybody about the supposed inventory shortage in
6 the mid 1970s.

7 Then, in 2004, the insurers came to Billings, filed
8 this suit to get a jury to tell us that we don't have to pay
9 them a penny to clean up the problem that they created.

10 You'll recall what happened then. The morning after
11 Dyce's Christmas party in 2004, Tom Mielenhausen, who is
12 Mr. Banker and Mr. Lynch's partner, met with Mr. Hallsten.
13 What was the result of that meeting? Lo and behold, Hallsten
14 came out of the meeting having recalled a perc inventory
15 shortage of 250 to 1,000 gallons that supposedly happened in
16 the first quarter of either 1975, 1976, or 1977.

17 It was, to say the least, a most convenient
18 recollection.

19 It was a recollection of an event that happened to
20 be right before the policies that USF&G and Continental issued
21 came into being. It also happened to be in an amount that
22 coincided, Dyce thought, with the amount of perc that was out
23 in the northwest corner.

24 Now Monte Naff is the other witness who recalled the
25 inventory shortage. Mr. Naff is also a long-time Dyce

1 executive. He worked for Dyce and its successors for 29
2 years. Even though he's now retired, he's still being paid by
3 Soco for his time as a consultant, including his time
4 testifying in this case.

5 And, most significantly, the Dyce facility became
6 horribly polluted during the time that Mr. Naff was the
7 general manager there, from 1978 to 1989, during the time that
8 he testified that he pretty much ran the place. Now just like
9 Hallsten, Naff never came forward with the inventory shortage
10 story during the entire time that the EPA was trying to figure
11 out the source of the Lockwood contamination and how to clean
12 it up. In fact, Naff said he did not recall an inventory
13 shortage at all until Tom Mielenhausen gave him a copy of
14 Hallsten's deposition in this case. Then, according to
15 Mr. Naff, his recollection was jogged.

16 Again, a most convenient recollection.

17 Now in trying to determine whether Hallsten and Naff
18 are telling the truth about the inventory shortage, you should
19 keep in mind that the two of them don't agree on even the most
20 basic facts regarding the inventory shortage.

21 Hallsten at first testified that the shortage
22 occurred in the first quarter of 1975, 1976, or 1977, but as
23 Mr. Banker said, he admitted on cross-examination that it
24 could have occurred at any time while he was on the order
25 desk, the entire period from, actually from 1974 until early

1 1978.

2 Naff says he recalls it quite differently. Naff
3 testified that he thought the shortage was discovered in the
4 last quarter of one of the years Hallsten was on the order
5 desk, especially when Naff was a new employee, because
6 Mr. Dyce was in Billings for the holidays, and Hallsten was
7 afraid of what Mr. Dyce's reaction would be when he returned
8 to town and was told about the shortage. And Mr. Naff doesn't
9 recall 250 to 1,000 gallons. He recalls about ten to 12 drums
10 worth, which is about 500 to 600 gallons.

11 All of this testimony is at the heart of Soco's
12 case. And the two witnesses don't agree on even the most
13 basic facts about the timing or volume of this alleged
14 shortage. And, of course, there are no other witnesses who
15 recall the inventory shortage, and, of course, no documents
16 that said it ever happened.

17 Perhaps most significantly, Mr. Naff said that when
18 Quentin Dyce was told about the shortage, it was one of the
19 two or three times in their long history together at Dyce that
20 he ever saw Quentin Dyce that upset. Yet neither Hallsten nor
21 Naff ever heard Quentin Dyce mention it again.

22 Why, why do you think that is? Do you suppose it's
23 because, when Mr. Dyce examined what happened, he determined
24 that it was a paperwork error?

25 Indeed, we heard Richard Brill, one of the people

1 that you saw who testified on video -- you saw his deposition
2 on Monday -- he said the guys outside would drum perc off the
3 perc bulk tank and then forget to turn the paperwork in
4 reflecting that they did that. Brill said that there could
5 have been as much as a 1,500-gallon discrepancy between what
6 the office thought was out there in the perc tank and what
7 they actually had.

8 In any event, as I said before, there is absolutely
9 no evidentiary link between this supposed inventory shortage
10 and a spill. If the inventory shortage actually happened, it
11 was likely a paperwork mistake that was resolved. Otherwise,
12 both Hallsten and Naff surely would have heard lots about it
13 from Mr. Naff -- from Mr. Dyce. Excuse me. That is, of
14 course, if it actually happened.

15 Now let me talk about the expert witnesses who you
16 heard testify in this case.

17 First, there was Peter Shanahan, Dr. Peter Shanahan,
18 our environmental consulting expert who teaches at MIT.

19 Neil, please put up Exhibit 3059, page 121.

20 DOCUMENT TECHNICIAN: (Complied with request.)

21 MR. JOHNSON: Of all the stuff that we've shown you
22 during the last eight days, this is the one you probably have
23 seen the most. I see it when I go to sleep at night. Maybe
24 you do, too.

25 Dr. Shanahan testified that he agrees with the EPA

1 that there are two perc source areas in the operational area
2 of Dyce: this one, which is around the drumming shed, and
3 this one, which is -- I'll circle it a little bit -- which is
4 where the historic catch pond used to be.

5 Indeed, if anything, the EPA probably understated
6 the perc source areas when you consider that Soco's own
7 consultant, James Sullivan of ATC, held back data on the perc
8 he discovered under the cement containment ponds that were put
9 in many years later.

10 According to the EPA's record of decision, the ROD,
11 which you've heard, there is a DNAPL perc source under the
12 catch pond. And there frankly is no mystery as to how it got
13 there. The evidence is clear that Soco had a severe
14 wastewater management problem, a problem that started in the
15 1970s, continued throughout the 1980s, and even into the
16 1990s. You'll remember the Montana government report in 1992
17 that said that Dyce did not have control of its waste streams,
18 of its wastewater streams.

19 Chemicals, including perc, were routinely splashed
20 around, spilled, and then hosed into whatever wastewater
21 containment structures were used at the time, including, of
22 course, the catch pond that was in use all the way up until
23 1986.

24 Dr. Shanahan testified that this is a dirty site.
25 Those were his exact words. This is a dirty site with

1 widespread contamination. And he told you that the small
2 routine spills of perc would get hosed down by the Dyce
3 employees, down to the catch pond, with the perc carried by
4 the water in little suspended bubbles. When it got to the
5 catch pond, the perc, being heavier than water, would drop to
6 the bottom, and the BTEX, which was also washed down there,
7 being lighter than water, would sit on top and evaporate.

8 From there, the perc would be discharged from time
9 to time over the years. How was that done? Well, nobody has
10 admitted how it was done, but you heard Douglas Johnston, a
11 former Dyce Lockwood site manager, come into court and testify
12 that Dyce could have just taken a hose, if it wanted, it just
13 could have taken a hose out to the catch pond and thrown that
14 hose on the bottom, gone out there with a pump, and sucked the
15 perc right out of the bottom of the catch pond.

16 In the 1970s, before the berm and catch pond were
17 expanded in 1981, that's likely exactly what happened when the
18 pond got too full and had to be emptied from time to time.

19 Please put up 5024.

20 DOCUMENT TECHNICIAN: (Complied with request.)

21 MR. JOHNSON: Now this is the September 1977 photo.

22 Neil, please focus in on the man-made ditch area,
23 okay? Even more.

24 DOCUMENT TECHNICIAN: (Complied with request.)

25 MR. JOHNSON: Okay. That's good.

1 This is the area, obviously the catch pond, and Kris
2 Stout, our historical photographic analyst, told you that --
3 let me get this right -- that that area right above where I
4 just marked is a man-made ditch that first appeared in 1977,
5 and Soco's expert, photographic expert, Mr. Grip, agreed that
6 it appeared to be man-made.

7 Why do you suppose that Dyce cut this ditch right
8 outside the berm? The flow pattern from that ditch to the
9 contamination in the northwest corner, the pattern of the
10 vegetation starting in 1977 and getting worse every year until
11 the catch pond was expanded in 1981, and Dyce's long history
12 of dumping excess water into the pastures around its facility
13 all support the conclusion that Dyce emptied the pond in the
14 1970s through this ditch. Then when they reconfigured the
15 catch pond and they reconfigured the berm in the early 1980s,
16 they stuck a pipe into it and emptied the pond that way.

17 He said that we only brought in Kjos and Brill.

18 Well, we didn't bring him into court. They did. We
19 didn't think it appropriate. We played his deposition
20 testimony. You know who I'm talking about: Marvin Johnson.

21 Marvin testified that the catch pond was -- he
22 testified nine years ago in his video -- that the catch pond
23 was emptied about 30 times, each time spilling thousands of
24 gallons out into the prairie. Nobody else admits that. Why
25 is that?

1 The management guys that they brought in denied it.
2 Why do they deny it? It's pretty obvious. These guys
3 polluted Lockwood. Of course they're going to deny it. Of
4 course they're going to deny it.

5 Marvin Johnson, though, horribly ill, as you saw,
6 thank God he's come forward to tell the truth. He's
7 apparently the only one, but he's done it.

8 Now Soco's expert, Dr. Powell, said that he thought
9 there should be more perc under the catch pond, under MP-105
10 that you've heard so much about, but that makes no sense.
11 Soco claims that the pond was lined, and you heard testimony
12 to that effect. It's likely that the liner mostly but not
13 completely worked. That allowed some perc to get into the
14 earth below where it was found by the EPA, notwithstanding the
15 fact that by the time the EPA got there, that old catch pond
16 had been dug up not once but twice, first when Dyce
17 reconfigured things in 1981 and later when Dyce put fly ash
18 over it in 1986.

19 The evidence demonstrates that the catch pond was
20 emptied into the northwest pasture because the telltale signs
21 of the white crystals that Dr. Shanahan tracked from the
22 mixing of acid and lime in the catch pond were found in soil
23 samples in the northwest corner. And, indeed, Kaivos also
24 found acidic soil out that way which he traced to the catch
25 pond.

1 As for Dr. Powell's suggestion that a DNAPL perc
2 deposit slid down the bedrock from higher up in the plume? I
3 think that's preposterous. Just how was it that the DNAPL,
4 sliding down the bedrock, knew to get off exactly at the catch
5 pond? How convenient for him to testify to that.

6 Now Dr. Sternberg's testimony -- you can take it
7 off.

8 DOCUMENT TECHNICIAN: (Complied with request.)

9 MR. JOHNSON: Dr. Sternberg's testimony supported
10 Dr. Shanahan's conclusion. Dr. Sternberg testified that there
11 were only about 80 gallons of perc in the northwest corner
12 soil and groundwater and downstream in the groundwater as it
13 made its way to and then into the Yellowstone River, not the
14 200 to 300 gallons that Dr. Powell estimated using, I think, a
15 most improper way of averaging numbers.

16 Finally, Dr. Powell made much of the fact that there
17 is just perc, not BTEX, in the northwest corner, but
18 Dr. Shanahan explained that whatever BTEX did not evaporate in
19 the catch pond was pumped into the northwest corner and
20 biodegraded there over time.

21 What is telling is Exhibit 279. Page 7.

22 DOCUMENT TECHNICIAN: (Complied with request.)

23 MR. JOHNSON: This is the chemical profile that
24 Dr. Shanahan testified to. The chemical profile of the sample
25 that was taken under the catch pond, MP-105, is almost

1 identical to the samples that were taken from the heart of the
2 northwest corner, PT-02 and PT-06.

3 Dr. Shanahan also testified that given the testing
4 that was done near the railroad ditch, it's not -- you can
5 take it down, Neil.

6 DOCUMENT TECHNICIAN: (Complied with request.)

7 MR. JOHNSON: -- it's not what one would expect if a
8 400- to 500-gallon or more river of perc came cascading down
9 that ditch like a tsunami.

10 Pull up Kristin Stout's demonstrative of MW-101 and
11 BH-F.

12 DOCUMENT TECHNICIAN: (Complied with request.)

13 MR. JOHNSON: The question is, if that actually
14 happened, how is it that BH-F, which is right here, is so hot,
15 is so contaminated, but MW-101, which is right here, is not?

16 The pollution, frankly, had to come, the pollution
17 that's measured at BH-F frankly had to come from the catch
18 pond and likely came through that cut in the berm, because, as
19 you recall, the underlying wastewater flowed like that, or, I
20 mean, groundwater flowed like that, and obviously BH-F would
21 get contaminated but this one wouldn't. But if it came
22 through the ditch, of course, MW-101 would have been
23 contaminated.

24 You can take it down.

25 DOCUMENT TECHNICIAN: (Complied with request.)

1 MR. JOHNSON: Finally, if Soco really believed its
2 own spill story, why didn't it simply test the ditch? BH-F is
3 still, to this day, hot, very contaminated. If Soco's spill
4 really explained BH-F, then all of the contamination that one
5 would expect to find back up that ditch, back up toward the
6 loading and unloading area, should still be there.

7 Would you pull up 51, Demonstrative 51? And focus
8 in on this area here.

9 DOCUMENT TECHNICIAN: (Complied with request.)

10 MR. JOHNSON: This is Mr. Grip's photo. He plotted
11 where that old ditch, that old ditch next to the railroad
12 spur, is in the modern plant. They could have, if they wanted
13 to, tested anywhere along there. It's their own property.
14 The site is sitting idle. Just try. That's all they had to
15 do. Take a look in the ditch area. I submit that Soco's
16 failure to do so speaks volumes about what Soco, itself,
17 thinks about its ditch theory.

18 Take it off.

19 DOCUMENT TECHNICIAN: (Complied with request.)

20 MR. JOHNSON: Now let me talk about the historical
21 photographic evidence. You'll remember that I said during my
22 opening statements that a picture is worth a thousand words.
23 Mr. Grip said the same thing on the witness stand yesterday.
24 But he admitted that he couldn't see in the shadows north of
25 the warehouse and the drumming shed in those 1975 and 1977

1 photos, so he really didn't know whether the berm was
2 completed in those years on the south side of the tank farm.

3 If the berm wasn't completed on that south side, the
4 drainage from the loading and unloading area was into the tank
5 farm, not into the ditch next to the railroad spur. Virtually
6 every witness agreed with that conclusion.

7 In fact, Suzanne Miller, in Dyce's sworn responses
8 to the EPA's 104(e) requests, said exactly that, that any
9 spill in the loading and unloading area in those years would
10 flow down to containment in the catch pond.

11 Now Banker, Mr. Banker suggested that we're bringing
12 Ms. Miller's credibility to question. We aren't. We aren't
13 doing that. She's telling the truth. She talked to
14 everybody. Everybody told her if there were a spill in the
15 loading and unloading area, it would go down to containment in
16 the catch pond. It's only after we filed this suit that the
17 story changed.

18 Now Kristen Stout told you that, using her
19 equipment, she could see that berm, which was under
20 construction in 1984, and that she could see that it was not
21 completed in 1985, and that it was never extended all the way
22 across the south side of the tank farm until 1989.

23 MR. GROSSBART: '79.

24 MR. JOHNSON: '79. Excuse me. 1979. I got my '80s
25 and my '70s mixed up.

1 It was under construction in 1974. It was
2 completed -- not completed in 1975, and it was never extended
3 all the way along the south side of the tank farm until 1979.

4 That means that if a spill happened in 1975 to 1978,
5 it would have flowed into the tank farm, not the railroad
6 ditch. That's what Ms. Stout testified to and exactly what
7 Suzanne Miller told the EPA.

8 Now Mr. Grip also said that he saw a railroad --
9 very shallow depression north of the small warehouse to the
10 railroad ditch, but the basis for his opinion seemed to be
11 nothing more than the brightening of the shadows in that
12 picture. Here is what he showed us.

13 Show 4841. Do you have that?

14 DOCUMENT TECHNICIAN: (Complied with request.)

15 MR. JOHNSON: This is what he showed you. These are
16 our markings on there to help orient you. But he said, well,
17 gee, he saw a pathway, because -- this was a pathway that he
18 saw. Whoops. I made it too big. Right there. That's the
19 pathway that he saw. But, you know, this is nothing more --
20 you saw the progression of photos. This is nothing more than
21 shadows when you continually lighten it. These are the last
22 and darkest shadows that appear. I thought it was
23 hocus-pocus, but it's up to you to decide whether or not his
24 testimony can be believed.

25 The photos, on the other hand, tell a compelling

1 story.

2 Take that off, Neil.

3 DOCUMENT TECHNICIAN: (Complied with request.)

4 MR. JOHNSON: You'll be able to study them in the
5 jury room. Let's take a quick look at them one more time.

6 How about 5017?

7 DOCUMENT TECHNICIAN: (Complied with request.)

8 MR. JOHNSON: The northwest corner on June 18, 1974,
9 as you can see, has very healthy vegetation.

10 How about 5024?

11 DOCUMENT TECHNICIAN: (Complied with request.)

12 MR. JOHNSON: This is September 6, 1977. The
13 northwest corner still has healthy vegetation, even though if
14 a spill of perc of 250 to 1,000 gallons had occurred in 1975
15 or 1976 or before September of 1977, the northwest corner
16 vegetation would have been killed. But there is some
17 vegetation near the catch pond which you can see which is
18 having problems, but that's not surprising because of the
19 man-made cut, the man-made ditch that's just outside the berm
20 that leads directly to that devegetated area.

21 Pull up 5028, Neil, please.

22 DOCUMENT TECHNICIAN: (Complied with request.)

23 MR. JOHNSON: 5028 is the May 1979 photo. The
24 devegetation has gotten much worse, and it's right on the
25 pathway, right on the pathway from that cut outside the berm.

1 And there, importantly, is devegetation heading to
2 the north on the east side of the northwest corner. This is
3 the northwest corner. This is not. This is east of the
4 northwest corner. Where did that vegetation -- devegetated
5 area lead to?

6 Neil, please pull up 614, page 6.

7 DOCUMENT TECHNICIAN: (Complied with request.)

8 MR. JOHNSON: These are the green blobs, as we've
9 called them, from the EPA's report. We've superimposed these
10 green blobs from their report over the 1979 photo that you
11 just looked at. The devegetated area that's to the east of
12 the northwest corner leads directly to that blob. That green
13 blob confirms that devegetation, that the devegetation there
14 comes from the catch pond discharges of perc.

15 Finally, Neil, put up 5036, which is June -- oh,
16 I've got the number wrong. How about the June 1981 photo?
17 Can you do that?

18 (Pause.)

19 MR. JOHNSON: I'll tell you what. You got it?

20 DOCUMENT TECHNICIAN: (Complied with request.)

21 MR. JOHNSON: There it is.

22 June of 1981, June 2 of 1981, the devegetation has
23 obviously gotten worse.

24 And if you'd put 614, page 8, up?

25 DOCUMENT TECHNICIAN: (Complied with request.)

1 MR. JOHNSON: You can plainly see, plainly tell, see
2 that the area east, which is still devegetated, gotten worse,
3 leads directly to that green source area of perc, which is
4 east of the northwest corner.

5 Ladies and gentlemen, these photos, when viewed
6 together, plainly tell the story of how the northwest corner
7 and the surrounding areas became contaminated and how the
8 contamination continued long after Soco's imaginary spill of
9 perc.

10 Now let me, let me -- you can take that down, Neil.

11 DOCUMENT TECHNICIAN: (Complied with request.)

12 MR. JOHNSON: If, despite all this evidence, you
13 still conclude that there was a sudden and accidental spill of
14 perc in the mid 1970s, then Dyce, under the insurance
15 policies, was required to give USF&G and Continental written
16 notice of it. Dyce was required, under the policies, to give
17 the insurance companies written notice of an occurrence, that
18 is, an event giving rise to expect a property damage, as soon
19 as practicable.

20 The policies require that the written notice contain
21 reasonably obtainable information with respect to time, place,
22 and circumstances, and the names and addresses of the
23 available witnesses. If this spill actually had occurred in
24 the mid 1970s, Dyce simply failed to comply with that
25 requirement. They failed to give notice to the insurers as

1 soon as practicable.

2 They will say, "Well, gee, we didn't know perc was
3 going to hurt the environment, so we didn't know that there
4 were going to be claims because we didn't know that there was
5 going to be damage."

6 Really?

7 You heard Mr. Colver testify that Mr. Dyce told him
8 perc is harmful to the environment. Perc is harmful to the
9 environment. They knew, if it got out, that it was going to
10 cause environmental damage which causes, under the terms of
11 the property -- I'm sorry, under the terms of the policies,
12 property damage.

13 Dyce never gave notice of an occurrence, ever. They
14 only gave notice a quarter of a century after this spill
15 allegedly occurred. And they only gave notice to the
16 insurance companies when the EPA told them that they were
17 potentially responsible to clean up the site.

18 By that time, the available witnesses had lost much
19 of their memory about what had happened when. In fact,
20 Mr. Dyce himself had died, a principal person who could have
21 told us whether or not this actually occurred. He died in
22 1995. And all, all of the relevant documents concerning the
23 supposed inventory discrepancy, all of the inventory records
24 from back in that time period, and almost all of the other
25 records were thrown out.

1 The judge will instruct -- has instructed you, and
2 you will see it in the instructions, that the insurers must
3 prove prejudice from the late notice.

4 Ladies and gentlemen, the evidence of prejudice is
5 overwhelming. Witnesses are no longer available or have lost
6 their memory. The documents are gone. The Dyce site has been
7 remodeled and reconfigured.

8 And perhaps most importantly, the pollution that
9 would have resulted from this alleged spill, if it actually
10 happened, the pollution that occurred from this was left to
11 fester and spread, costing, now, millions of dollars to clean
12 it up. If timely notice had been given, it would have been
13 much less expensive to clean it up; that is, if it actually
14 happened.

15 Thank you, again, for your service in this case.
16 Let me turn over the podium to my colleague, Mr. Davis.

17 THE COURT: You've got 19 minutes.

18 Thank you.

19 MR. DAVIS: Ladies and gentlemen, I've got good news
20 and good news. I'm not going to repeat very much of what
21 Mr. Johnson said, and the good news is, even if I tried, Judge
22 Cebull wouldn't let me talk very long.

23 But you know something? Maybe this gray hair of
24 mine is a little bit of a giveaway I've been doing this for a
25 little while. I frankly, to pick up on my colleague Rob

1 Johnson's last point, have never heard a lawyer talk his
2 client out of court faster than Mr. Banker did this morning on
3 this notice issue.

4 What did he tell you? "Yeah, that would have been a
5 dramatic event, this supposed 500-gallon spill." And
6 that's -- I'll use 500 gallons because their expert,
7 Dr. Powell, said it would take at least 500 gallons for the
8 200 gallons that he's calculated is out in the northwest
9 corner to get there. The 250 gallons, the lower number
10 Mr. Hallsten gave as a spill, just wouldn't do the trick.

11 So let's work a working hypothesis, to the extent
12 this thing has any validity in your mind, that this has to be
13 about a 500-gallon spill.

14 Mr. Banker said, "Yeah, that would have been a
15 dramatic event, but," he told you, "somebody must have noticed
16 the spill. We just didn't have them come in here to court to
17 testify."

18 Well, was that somebody some 13-year-old kid riding
19 his bike down Taylor Lane back in 1975, '76, or '77? No.
20 That somebody had to be a Soco -- or a Dyce employee. That's
21 who would have noticed it. That's who would have walked out
22 in the loading area and seen this spill at some point that
23 day.

24 Well, the judge has instructed you, and if you look
25 at Instruction No. 7, what he says is knowledge of an officer

1 or employee is, in law, considered to be the knowledge of the
2 corporation. So by the Court's instructions, what Mr. Banker
3 told you is Dyce knew back then that there had been a spill,
4 that there had been a spill that left containment, because it
5 never was in containment, and it traveled out into the
6 environment. And as Mr. Johnson told you, the idea that they
7 didn't know that perchloroethylene was harmful to the
8 environment -- do you remember Mr. Colver told you they knew
9 it dissolved rubber hoses? I'll come back to that point in a
10 minute. This was bad stuff. They knew -- what Mr. Banker
11 told you this morning was that Dyce knew, as a matter of law,
12 that this happened back then.

13 And as far as my client is concerned, prejudice, the
14 prejudice is even more obvious.

15 Can we pull up 143, Neil?

16 DOCUMENT TECHNICIAN: (Complied with request.)

17 MR. DAVIS: This is the document, for reasons that
18 totally escape me, they think is such a wonderful document.
19 This is the inspection report that a representative of
20 Continental Insurance Company filled out when he went out
21 there in 1982.

22 Guess what? Guess when Continental started to
23 insure Dyce? 1982.

24 Page 2, Neil. Blow up the middle.

25 DOCUMENT TECHNICIAN: (Complied with request.)

1 MR. DAVIS: You got it.

2 "No losses reported." So here they are, telling
3 someone who is going to come out and insure you, "We haven't
4 had any losses. We're not missing anything. Go ahead and
5 insure us."

6 The prejudice is obvious. They wouldn't have gotten
7 the insurance.

8 As I said, my time is limited, and I don't want to
9 talk -- I don't think the case, even though there are
10 questions on that verdict form about notice and prejudice, I
11 don't think you even get there when you go into the jury room.

12 And, again, to reiterate the point that Mr. Johnson
13 made, and I forgot he said it, but Mr. Grip certainly said,
14 "Yeah, one picture is worth a thousand words." And given the
15 limited time that I have, we'll have to use pictures.

16 And, Neil, would you be so kind as to pull up 5042?
17 And would you blow up the loading area?

18 DOCUMENT TECHNICIAN: (Complied with request.)

19 MR. DAVIS: Do you remember back on Friday -- I
20 mean, again, let's put this in context for a minute.

21 Their view is that there was a spill in the loading
22 and unloading area in the mid 1970s. That's the story they
23 want you to buy, the story that first surfaced when
24 Mr. Hallsten and Mr. Mielenhausen met at Christmas in 2004.
25 That it would have flowed off from the loading and unloading

1 area, down this railroad ditch, and out into containment --
2 and out into the northwest corner.

3 And, again, as you know, we agree. Mr. Johnson and
4 I agree. Our clients agree. That's an imaginary event. It
5 never happened.

6 But what's so significant about 5042 is what I asked
7 Dr. Powell. And, remember, there's a concrete apron. That's
8 how Dr. Grip or Mr. Grip described it yesterday to you, a
9 concrete apron coming off that small barn. We asked the
10 employees. That was a ramp running down to get into the small
11 barn.

12 There's, there's the drainage pattern. It's right
13 there for you to see. Remember I asked Dr. Powell, "Isn't it
14 going 180 degrees the wrong direction for their theory?" And
15 it sure as heck is. Mr. Grip was in the courtroom. The
16 lawyers were obviously here. If I was wrong about what this
17 picture shows about the historic drainage pattern -- and,
18 again, it's the same concrete pad, or apron, as Mr. Grip
19 called it. If I was wrong about which way things might have
20 flowed if there was a spill in the loading and unloading area,
21 you would have heard about it from Mr. Grip yesterday, but you
22 didn't hear Mr. Lynch, when he went through all of the
23 pictures with Mr. Grip, mention or even have him try to
24 explain this, because they knew that while they may try to
25 manufacture some imaginary event, they would just be way over

1 the limit, they would have been way over the limit to try to
2 tell you people black was white, right was left, whatever.

3 That's the historic drainage pattern. It always
4 was.

5 Sure, if rain comes off the roof of this building
6 and it falls in that little alleyway, it would drain off, back
7 in the '70s, into the ditch. Did anyone tell you that's where
8 they backed up trucks, to here, in the 1970s, to off-load
9 product?

10 Would you pull up, Neil, 5038? Blow it up, the
11 loading area.

12 DOCUMENT TECHNICIAN: (Complied with request.)

13 MR. DAVIS: I asked Mr. Warne. "You see the truck
14 there. Is that where trucks were historically loaded and
15 unloaded?"

16 "Yes, that accurately reflects the loading/unloading
17 area."

18 They didn't tell you that trucks backed up to here.
19 So how the heck does a spill here get over there? I don't
20 know how many pictures we looked at with Dr. Powell of stains
21 and spills that stayed right here. It didn't happen.

22 It couldn't happen. The site, even in their wildest
23 imagination of trying to sell this story about a spill that
24 got out of containment, somehow managed to get around a
25 building, down into a ditch, it couldn't happen, it never did

1 happen, and the pictures prove it conclusively.

2 Pull up 5042 again, Neil. Blow it up again.

3 DOCUMENT TECHNICIAN: (Complied with request.)

4 MR. DAVIS: If I'm wrong, that this doesn't reflect
5 the historic pattern, that there's evidence that you heard in
6 this courtroom, I challenge those lawyers to tell you who told
7 you that that does not reflect the historic pattern? What
8 witness came up on the witness stand and told you that after I
9 brought it out to Dr. Powell?

10 Not a one. And they had every opportunity yesterday
11 with Mr. Grip.

12 That's your historic pattern, right there.

13 And as Professor Dale indicated to you, it's
14 impossible to imagine a scenario -- and I mentioned -- I said
15 this. Mr. Johnson told you in his opening that you wouldn't
16 hear anyone who would tell you that they saw, heard, or
17 smelled a spill. What I remember telling you in the opening
18 is you won't hear anyone on that witness stand tell you how
19 such an event could have happened in the loading and unloading
20 area, and you didn't.

21 You didn't hear one witness who could tell you,
22 "This is how a spill could happen as we unloaded
23 perchloroethylene," or, "Dyce employees unloaded
24 perchloroethylene in the loading and unloading area in the
25 1970s." Not a witness.

1 I explored it with Dr. Powell. "Can you imagine,
2 you know, pumping it off at 60 gallons a minute in the loading
3 and unloading area?" He agreed with me. We went through
4 those three scenarios: either as you're offloading it, as
5 it's just sitting there statically with no one doing anything,
6 or as you're loading it to take it to the drycleaners. He
7 agreed with me; the only plausible scenario in those three
8 possibilities was the first, unloading. And he couldn't
9 imagine how that could happen, particularly if you had a
10 1,500-gallon tank and you're getting a shipment of 3,000 or
11 4,000 gallons of perc.

12 As Dr. Dale told you -- I mean, they would fill the
13 perc tank first, and that's where Mr. Hallsten, after he met
14 with Mr. Mielenhausen, when he recalled this inventory
15 shortage, he told you on the witness stand it was. He told
16 someone to go out and check the perc tank repeatedly, and
17 that's where the alleged inventory shortage was discovered.

18 Well, they would come in and fill the perc tank, and
19 then they would have to, because that only held 1,500 gallons,
20 they had another 1,500 to 2,500 gallons of perc to put
21 somewhere. They put it into drums. Those were filled in the
22 drumming shed, that place, that little building that had the
23 stains in front of it or the spill pattern in front of it.

24 And as Dr. Dale told you, that's an inconceivable
25 scenario given the qualities, the chemical properties of perc.

1 That after they go -- somehow spill 500 gallons filling a
2 1,500-gallon tank, some guy is sitting there with a hose and a
3 nozzle, going, "Here's a 55-gallon drum to fill. Okay."
4 There would be 30 drums or so to fill, standing there in the
5 middle of tons, tons of perchloroethylene. Dr. Dale told you
6 he couldn't imagine how that could happen. The guy would be
7 overcome by the fumes.

8 But more critically, if you think about it, is the
9 obvious fact, as Dr. Dale explained to you, there would be
10 unmistakable physical evidence of such an event occurring.
11 Perc is a solvent for asphalt. Every witness who was asked
12 that question agreed. And, you recall, if you go look at
13 those 104(e) responses, that's what Suzanne Miller says in
14 them; that the employees all said, if something like that had
15 happened, they would have noticed it because it would have
16 affected the asphalt.

17 And, again, if what Dr. Dale told you wasn't
18 scientific, absolute truth, we would have heard someone else
19 come up on the witness stand to tell you that what he told you
20 is not a scientific fact. It is.

21 So the asphalt, it would -- what did Mr. Banker say?
22 It would have been a dramatic event? It would likely be one
23 of the most memorable events besides that hydrochloride acid
24 tank, railcar tank event that they all seem to remember rather
25 vividly. This would have been one of the most vivid and

1 memorable events in the short history of Dyce Chemical over
2 the last 40 years.

3 Dr. Dale told you the perc would have dissolved the
4 asphalt instantly. It would have engulfed the whole loading
5 and unloading area, a spill of 500 gallons. You saw how he
6 put that disk there.

7 Now it's fine for Mr. Banker to say, "Well, he said
8 it was 75 degrees and flat." Well, it's pretty flat, based on
9 those pictures.

10 And did they give you any explanation how someone
11 could spill 500 gallons in that enclosed loading and unloading
12 area and it not impact all or almost all of the asphalt? They
13 can't. They can't because it's impossible.

14 So, again, the asphalt would have been destroyed or
15 damaged. So much of it would have been washed away, it would
16 have left a bathtub ring on the surrounding buildings.

17 And, most critically -- if we can go back to 5038
18 again, Neil?

19 DOCUMENT TECHNICIAN: (Complied with request.)

20 MR. DAVIS: With the truck, remember he showed you
21 the pictures that his friend Elden Dickinson took? To me, the
22 most significant one was the one with that footprint in it
23 with a 170-gallon spill on the asphalt in Michigan. When you
24 saw how the fireman had left a footprint in the asphalt,
25 because it would collect in the low areas and turn that into,

1 as Dr. Dale explained to you, a tarry mess, assuming that that
2 happened as they're offloading a truck, how does that truck
3 get out of there? Number one, as Mr. Colver told you, it
4 attacks rubber. So assuming the tires haven't been eaten away
5 by the tons of perc that have been spilled, at a minimum there
6 would be deep, deep ruts in that parking lot, parking --
7 unloading area as that truck pulled out. Yet no one seems to
8 notice it.

9 It went totally unnoticed. It went totally
10 unnoticed, ladies and gentlemen, because scientifically it
11 could not and did not happen.

12 There was no spill of 500 gallons of perc in the
13 Dyce loading and unloading area in the 1970s. The physical
14 evidence is conclusive. It just didn't happen.

15 Let me talk about the jury verdict.

16 Can we put up -- I need page 1, Amanda. Well,
17 page 2, I guess. I'm sorry. I apologize.

18 THE COURT: You have three minutes.

19 THE CLERK: (Complied with request.)

20 MR. DAVIS: Was groundwater contamination at or near
21 the Soco facility caused by an occurrence? All you have to do
22 is say no. And as you read the instructions, that's all --
23 that's the only question you need to, that's the only question
24 you should answer. There was no occurrence.

25 And, again, I refer you back to Instruction 14. The

1 judge has instructed you on the meaning of "occurrence." I'll
2 read it to you, since my time is quite limited. "Each policy
3 defines 'occurrence' as an accident, including continuous or
4 repeated exposure to conditions which results in property
5 damage neither expected nor intended from the standpoint of
6 the insured."

7 First of all, the answer to Question 1 is there was
8 no occurrence because there was no spill in the mid '70s.

9 But even if, for reasons as Mr. Johnson indicated,
10 if you believe this cock and bull story about a 500-gallon
11 spill of perc, it wasn't unexpected. They had designed the
12 facility in the 1970s very deliberately, if you believe them,
13 for such a spill to occur outside of berms, in an area where
14 it was deliberately designed, by their theory, to flow off the
15 property, down into the northwest corner.

16 Even though they knew they had to provide
17 containment and they were building berms, even though they
18 knew that this stuff was a powerful chemical, even though
19 Mr. Dyce knew they had developed a catch pond to catch things,
20 even though they knew that was the one area where they would
21 be handling chemicals, transferring from one container to
22 another, the operational area, the one area they kept, they
23 now claim that was kept deliberately out of containment was
24 the loading and unloading area where they would expect spills
25 to occur; the one area, if you believe their theory that, "We

1 deliberately designed this facility in the mid '70s so that
2 the area where we handle chemicals was outside of
3 containment," it was expected that spills there would get out
4 into the environment. So even if you believe it happened, it
5 doesn't qualify as an occurrence because they expected it.

6 So under either scenario, the answer to No. 1 is no.

7 So, again, my time is about up. Let me close with
8 two points.

9 THE COURT: You've got 20 seconds.

10 MR. DAVIS: Thank you for your time.

11 And, No. 2, as has been indicated, they have a
12 chance to get up and say something in response to what
13 Mr. Johnson and I have said. We have no chance now to respond
14 to what they have to say. We have to leave this case to your
15 common sense. And, frankly, as far as the insurers are
16 concerned, we wouldn't have it any other way.

17 Thank you.

18 THE COURT: Thank you.

19 Mr. Banker, you may complete. You have 17 minutes.

20 MR. BANKER: Well, that was certainly interesting to
21 listen to from my perspective. It made for good theater.

22 But ask yourselves why they're not talking about the
23 most important thing. What is the perc, pure perc, doing down
24 in the northwest corner if there wasn't a sudden and
25 accidental spill?

1 They haven't presented any explanation for that.
2 The closest that they came to that was Mr. Johnson saying,
3 "Well, they probably put a hose in there and they pumped it
4 out." Okay. What witness took the stand and told you that
5 there was a hose in there, that they pumped it out of the
6 catch pond? Even Marvin Johnson, who talked about the pipe,
7 said, "I never saw a pump or a siphon connected to that hose."
8 The most he said was we turned it on, we opened the valve, and
9 that was that. You've got the scientific testimony that tells
10 you how that pipe wouldn't work.

11 But they talk about, you know, Soco's theory. Soco
12 is not presenting a theory. Soco is presenting an
13 explanation. They've got a theory. The theory is that
14 someone who never testified, never observed, threw a hose into
15 the catch pond and pumped out, and managed to pump out only
16 pure perc. Managed to just stop the pump exactly where the
17 perc was and get no other chemicals down into the northwest
18 corner. That's a theory, and it's not a very good one. It's
19 not supported by any evidence.

20 I was surprised to, once again, hear constant
21 references to Mr. Mielenhausen. You know, we took a look at
22 the transcript in this case, and Mr. Mielenhausen has been
23 referred to more times -- the second most of anyone in this
24 trial. The only one who's been referred to more is
25 Mr. Cozzens who is sitting here.

1 Why do they keep talking about Mr. Mielenhausen?
2 It's not denied that Mr. Mielenhausen is a partner of
3 Mr. Lynch and I. We work together. He's a lawyer who worked
4 on this case for a number of years. He talked to a lot of
5 witnesses. So did I. That's our job. We go out. We talk to
6 witnesses. We interview them. We investigate.

7 The suggestion implicit in all of that, that
8 Mr. Hallsten and Mr. Naff somehow invented a convenient story,
9 Mr. Hallsten and Mr. Naff were here. They were testifying
10 under oath. They were asked, "Did you come in here, into
11 federal court to commit perjury and make this story up, or is
12 this your recollection of an inventory discrepancy?" And they
13 said, "That's my recollection."

14 Now neither one of them said that they ever saw a
15 spill, and that's -- I mean, there is no witness that saw a
16 spill, and this idea that somehow there is knowledge of the
17 corporation that somehow is chargeable to Soco that goes back
18 to the 1970s, no one ever put together that there was a --
19 that the inventory discrepancy was a spill until it was
20 discovered that there was a historic pathway that went through
21 that ditch.

22 So -- you know, and they talk about knowledge, and
23 they talk about it in the context of notice, and when did Soco
24 have to provide notice? And they'd like to drag that all the
25 way back to the 1970s.

1 Quite frankly, knowing about an inventory
2 discrepancy, as Hallsten and Naff did, is not the same as
3 knowing about a spill. And knowing about a spill is not the
4 same as knowing about groundwater contamination. No one knew,
5 in the 1970s or '80s about groundwater contamination down in
6 the northwest corner.

7 The first suggestion that there was groundwater
8 contamination down in the northwest corner didn't come until
9 the Lockheed Martin report in 1999. There was nothing for --
10 there was no occurrence for Dyce to notify insurance companies
11 about in the 1970s. These were liability policies, liability
12 insurance policies that protect Soco from claims it made by
13 third parties.

14 If Soco would have called up its insurance companies
15 in the 1970s and said, "We've just had this inventory
16 discrepancy. Does our policy provide coverage?" the answer
17 would have been, "No. That's your inventory. What are you
18 talking about? Why are you telling us about this? Of course
19 we don't provide coverage."

20 If Soco would have said, "We had an inventory
21 discrepancy in the 1970s that went down the historic ditch and
22 wound up in the northwest corner," no one would have known at
23 that point that there was damage to groundwater. Again, the
24 question would have been, "Why are you telling us about this?"

25 So for them to come in here today and somehow

1 suggest that they should have known about this in the 1970s,
2 and, if they would have known about it, they wouldn't have
3 issued insurance policies, and they would have been able to do
4 all these wonderful things and clean it up, and they would
5 have been investigating people and doing all of this to
6 respond to Soco, well, they haven't, to this day, done
7 anything to help clean up down in the northwest corner. And
8 the suggestion that they would have done something differently
9 is nothing more than pure fantasy.

10 So what we know is that as soon as Soco knew that
11 there was a problem, that there was a potential claim, that
12 the EPA was looking at them, and the *Weiss* plaintiffs came
13 forward and made a claim against Soco, that's the point at
14 which Soco notified its insurance companies.

15 And the prejudice that they talk about, they're
16 using the wrong measure and time frame to think about the
17 prejudice that happened. Yes, witnesses have passed away.
18 Documents have been lost. But the fact of the matter is the
19 prejudice time frame that we're talking about is in the 1999
20 to 2000 time frame, and you have had no witness come in here
21 from these companies to explain what was lost between 1999 and
22 2000 that would have made any material difference to them in
23 terms of how they handled this.

24 Now Mr. Davis talked about how this was expected.
25 Okay. Now think about that. You heard testimony about why it

1 was that they built a berm in the first place. The building
2 of the berm in the 1970s time frame was to prevent against
3 tank rupturing and to have the contents of that tank hit the
4 surface water. That was the state of knowledge at that time
5 frame.

6 There was no expectation that there would be a
7 release in the unloading area that would somehow get out, down
8 into the northwest corner, and be causing damage 30 years
9 later. So, yes, they built the berm in a certain way, and you
10 even saw, in 1981, as the knowledge and understanding changed,
11 they adopted that so that the ditch was pulled back inside of
12 containment and more of the rainwater was handled.

13 Was there expectation in the 1975 to 1978 time frame
14 that this perc was going to get out, down to the northwest
15 corner, and cause all of the problems that it's caused today?
16 Absolutely not. And was it intended? It wasn't intended.

17 Perc was the chemical that Dyce handled. They
18 brought it in in bulk, and they resold it to make a profit.
19 There is no reason, purpose, or explanation for why perc would
20 be down in the northwest corner if not for an accident.

21 I want to comment, though. When Mr. Davis was up
22 here and talking about drainage patterns and whatnot, did you
23 catch his sleight of hand, as he talked about drainage in the
24 1970s, that he was only showing you pictures from the 1980s?
25 Why would he do that?

1 And then think back to the testimony of Mr. Colver
2 and Dr. Powell. They testified about what the drainage
3 pattern was and how the drainage moved through from the
4 loading and unloading area, down along the south berm, into
5 that ditch. And, you know, you can see, with your own eyes,
6 as you look at the photographs -- and you'll have those
7 photographs available to you in the jury room. You can see
8 with your own eyes where the drainage pattern came from and
9 where the water was going on that site.

10 When, I believe it was, Mr. Johnson said, you know,
11 that Mr. Colver knew perc was bad for the environment, well,
12 Mr. Colver wasn't able to put that in any particular time
13 frame, and he worked at the site for nearly 30 years. So at
14 what point did he have a particular understanding about how
15 perc was bad for the environment? I mean, it would be bad for
16 perc to be spilled down in there, even if it didn't hit
17 groundwater, just in the sense that that was their product
18 that they were selling to other customers.

19 So bad for the environment in what sense? What was
20 the knowledge in the 1970s? The only testimony you've had is
21 that the awareness was not there that perc was as dangerous as
22 we now appreciate today. You can't look at this with a 2010
23 perspective and put it back in the 1975 time frame and impose
24 the same understanding of what was known about. If a spill
25 happened of perc in the 1970s, it would be much different than

1 a spill of perc in the 2010 time frame.

2 There's been a lot of talk about asphalt in this
3 case, but I think that misses the point. The point on asphalt
4 is everyone agrees perc interacts with asphalt. There's a
5 disagreement about how much or how quickly it would affect
6 asphalt and whether or not it would look any different from
7 any of the other chemicals that were handled, and whether or
8 not the difference would be that significant as compared to
9 the other asphalt that was there, but it's not even necessary
10 for the perc to have hit asphalt.

11 You heard testimony in this case that before the
12 hard-line piping was plumbed in in the later 1980s, you had a
13 situation where they were bringing pipes and pumps. They were
14 using the pump configuration. They were bringing it in over
15 the top of the berm into the south or to the west of the
16 drumming shed in a situation where it might hit the concrete
17 that was on the concrete apron historically. It might hit the
18 dirt and gravel in the ditch that was there. And it might
19 have touched asphalt, but it's not necessary, for an
20 explanation of this, that all of the asphalt in the whole site
21 was affected. That isn't what was seen.

22 So, you know, the fact that Dr. Powell speculates
23 that that's what he thinks would have happened, using all of
24 his assumptions that are impossible in the real world, ask
25 yourself. You know, is asphalt even important to the

1 resolution of what happened here?

2 MR. COZZENS: It was Dr. Dale.

3 (Discussion off the record at counsel table.)

4 MR. BANKER: Yes. Sorry.

5 Mr. Johnson suggested that, well, you know, maybe
6 this inventory discrepancy was just maybe a paperwork error.
7 Well, you heard Hallsten, and it was Hallsten's job,
8 Mr. Hallsten's job, when he sat on the order desk. He was
9 responsible for that inventory. He was concerned about what
10 was going to happen to him after he reported this inventory
11 discrepancy. He checked the paperwork errors before he turned
12 it over to Mr. Dyce.

13 So although we don't know actually what the
14 resolution was, we don't know because Quentin Dyce was the
15 person who resolved it, we know that the inventory discrepancy
16 was ultimately written off. How and what Mr. Dyce did, no one
17 will know. That information was lost to the passage of time.
18 We talked about that, that there are pieces missing of this
19 puzzle, but there is no question that they ruled out the other
20 possible explanations for the inventory discrepancy before
21 turning it over to Mr. Dyce.

22 Now Mr. Johnson did say that pictures are worth a
23 thousand words at the beginning, and he said it again at the
24 end. Well, they do, and I'd like to end with looking at about
25 6,000 words in the form of pictures.

1 They spent an awful lot of time talking in this case
2 about devegetation and saying, suggesting to you that, you
3 know, the devegetation must have come from the catch pond.
4 Well, they're not the only people looking at these pictures.
5 We've looked at the pictures. You've looked at the pictures.
6 And we agree that they're important, that the pictures tell a
7 story. But I would suggest that the pictures in 1974, 1975,
8 1977, 1978, and 1979, in the devegetation, the gradual
9 increasing devegetation they show are more consistent with a
10 spill of perc in the northwest corner that got there through
11 the green line stormwater ditch.

12 Please pull up Exhibit 5017.

13 DOCUMENT TECHNICIAN: (Complied with request.)

14 MR. BANKER: This is one of the ones Mr. Johnson
15 showed you, and he said, "Well, look out there in the
16 northwest corner. The vegetation is okay in the northwest
17 corner. There is nothing going on out there." Well, that is
18 1974.

19 The next picture I want to show you is 5019. This
20 is a picture that Mr. Johnson didn't show you, but it's 1975.
21 And, again, you look out in the northwest corner, and there's
22 really not anything going on out there in terms of
23 devegetation.

24 Then turn to Exhibit 5024, 1977. This was one that
25 Mr. Johnson showed you, and he said, "Well, look. You know,

1 you don't see it in the northwest corner yet, but you're
2 starting to see there's something going on there." And he
3 says, "Well, that's something coming from the catch pond."

4 Now remember. This is not Marvin Johnson's catch
5 pond where he testified that there was a pipe, and we've got
6 issues with the pipe. We've talked about that. This is the
7 pre-1981 configuration of the catch pond. No one has
8 testified that there was a pipe in this catch pond, and no
9 witness has come and told you that they were pumping or
10 draining this pond in any way, shape, or form.

11 In 1977, you first see -- you know, and this was
12 something that Mr. Grip testified about, you know, that that's
13 the, you know, the cattle gate area, but it's along a historic
14 pathway that was a cattle trail. That's the point of least
15 resistance for liquid. That point connects up with this
16 ditch. If there was a spill in 1975, '76, or '77, you know,
17 is what we're seeing there consistent with what's going on?

18 Well, let's look at 1978. This is a photo
19 Mr. Johnson did not show you, Exhibit 5026.

20 DOCUMENT TECHNICIAN: (Complied with request.)

21 MR. BANKER: The quality on this photo isn't as good
22 as some of the others, but you can see, along this historic
23 pathway, that devegetation Mr. Johnson was so excited about,
24 it's out here now. It's getting bigger.

25 And when you move to the last exhibit that's a photo

1 exhibit, 1979, Exhibit 5028, what do we have there? Well, if
2 there was a spill in 1975, '76, '77, or '78, what you've got
3 in 1979 is northwest corner. What's happening there? What's
4 causing it? Is it caused by the spill in the loading and
5 unloading area, or is it caused by deliberate pumping from the
6 catch pond?

7 And that's really what this comes down to is
8 deciding. Do you believe Monte Naff and Rod Hallsten and the
9 testimony about the inventory discrepancy and the historic
10 ditch, the green-line ditch that went from the loading and
11 unloading area outside the berm down to the northwest corner,
12 or do you believe the insurers' theory -- I would submit it's
13 a theory -- that Dyce intentionally removed material from the
14 catch pond, pumped it out, somehow managed to get only perc,
15 pumped it down to the northwest corner?

16 You have to ask yourself: What makes more sense?
17 What is more easily reconciled in terms of more likely than
18 not?

19 So there is one last exhibit I want to show you.

20 Pull up DD87.

21 DOCUMENT TECHNICIAN: (Complied with request.)

22 MR. BANKER: Same picture. What is that green blob
23 there? Well, that's the green blob that we've seen from the
24 record of decision throughout this case. It more or less
25 matches the pattern of devegetation in the northwest corner,

1 and that's the missing piece to the puzzle, I submit to you.

2 More likely than not, what happened here was a
3 sudden and accidental release in the 1975, '76, '77, '78 time
4 frame, neither expected -- or that caused property damage,
5 neither expected nor intended by Soco. Soco is not an
6 intentional polluter. You've seen the Soco employees come in
7 here and testify.

8 And, you know, the insurance companies care so
9 passionately about this because if it happened the way Soco
10 has explained it and presented it to you, they're going to
11 have to help Soco pay for this problem.

12 THE COURT: You have a minute. Pardon me.

13 MR. BANKER: And, you know, that's why they've
14 invented all of these theories and these explanations that
15 don't make sense and brought in here experts to make
16 unreasonable assumptions.

17 We brought in the fact witnesses. We showed you
18 each one of them and had a relevant explan- -- you know,
19 relevant memory to this time frame. We let you observe their
20 credibility. We let you see who they were as people. They
21 got to ask questions about them to test their recollection,
22 and, at the end of the day it comes down to this:

23 If you believe the fact witnesses in this case, the
24 only explanation for what is pure perc that's down in the
25 northwest corner is the sudden and accidental release that

1 we've been talking about for the last two weeks.

2 Thank you.

3 THE COURT: Thank you.

4 Would the bailiffs come forward and be sworn,
5 please?

6 (Oath administered to bailiffs.)

7 THE COURT: Thank you.

8 Ladies and gentlemen, we're going to be in recess
9 now for your verdict.

10 There is a laptop in there, and there's a big
11 viewing, a big TV. It's got an icon in the middle of it, I
12 understand, that says "Trial Admitted Exhibits." You
13 left-double-click on that, and you'll get a list of all of the
14 exhibits.

15 Here in a moment, I am going to send in an index
16 that will tell you just a little brief explanation -- that I
17 presume JoAnn prepared?

18 THE CLERK: Correct.

19 THE COURT: And it will tell you, give you a brief
20 explanation of what exhibit, each one is. So when you call up
21 the exhibit, you'll all be viewing it at the same time. You
22 don't have to pore through these hundreds of notebooks that
23 you saw floating around in here.

24 We will be in recess for whatever it takes.

25 THE LAW CLERK: All rise.

1 (Jury not present.)

2 THE COURT: Counsel, have you seen this index of
3 exhibits?

4 MR. JOHNSON: No.

5 MR. DAVIS: No. I mean, I glanced at it, but I
6 haven't checked it for accuracy.

7 THE COURT: Well, I think, according to Amanda, she
8 and JoAnn, or you did, they went through the exhibits that
9 were on your --

10 MR. MICKELSON: CD.

11 THE COURT: -- CDs, and there were a couple from one
12 or the other that had been admitted for illustrative purposes.
13 Those were taken off.

14 But this is the index of the exhibits I intend to
15 have sent in the jury room, index of exhibits, and I want both
16 sides to agree that's all right. I mean, it's going to help
17 them immensely, and there is no reason not to do it.

18 So when you agree, walk up to the court reporter and
19 say you agree. If you disagree, come and get me.

20 MR. JOHNSON: Thank you, Your Honor.

21 THE COURT: Thank you.

22 (Judge Cebull left courtroom.)

23 (Discussion off the record.)

24 MR. DAVIS: Continental agrees with the index,
25 noting, for the record, that we have no idea what's on the CD

1 other than what's been represented. I mean, you know,
2 normally counsel would check the physical exhibits before they
3 went in the jury room. Obviously the exhibits, being on the
4 CD, aren't checkable. That's all. But we're okay with the
5 index and assume it's generally accurate. Okay?

6 THE REPORTER: You're okay with the CD, assuming
7 it's accurate?

8 MR. DAVIS: Yes.

9 (Discussion off the record.)

10 MR. LYNCH: Yes, we agree; Soco agrees with the
11 index of exhibits.

12 (Discussion off the record.)

13 MR. JOHNSON: USF&G agrees that the list of
14 documents of exhibits to be given to the jury is perfectly
15 done and fine with us.

16 (Recess taken from 11:50:30 to 16:22:35.)

17 (Open court.)

18 (Jury present.)

19 THE COURT: Please be seated.

20 Ladies and gentlemen of the jury, have you reached a
21 unanimous verdict?

22 FOREPERSON: We have, Your Honor.

23 THE COURT: Please give it to the bailiff. He'll
24 give it to me. I'll make sure that it's in proper form, and
25 then I will hand it to the clerk of court, who will publish

1 the verdict of the jury. It isn't like you see on TV.

2 FOREPERSON: That's okay. I'm all right with that.

3 THE COURT: Would the clerk please publish the
4 verdict of the jury?

5 THE CLERK: Yes.

6 Your verdict, ladies and gentlemen of the jury:

7 For the District Court, District of Montana,
8 Billings Division, in Cause No. CV-04-29-BLG-RFC, and in Case
9 CV-08-29-BLG-RFC, *United States Fidelity and Guaranty Company*
10 *and Continental Insurance Company v. Soco West, Incorporated:*

11 Question 1, Was groundwater contamination at or near
12 the Soco facility caused by an occurrence?

13 Answer, Yes.

14 Question 2, Did groundwater contamination arise out
15 of a sudden and accidental release of perchloroethylene at
16 Soco's Lockwood facility in 1975, 1976, 1977, or in early
17 1978?

18 Answer, No.

19 Signed --

20 THE COURT: Very well.

21 THE CLERK: Excuse me. Sorry.

22 Signed by the foreperson, March 18, 2010.

23 THE COURT: All right, ladies and gentlemen. Go
24 back to the jury room. I just need to talk to you for a
25 minute before you leave.

1 Please rise for the jury.

2 (Jury not present.)

3 THE COURT: Well, we're going to be in recess.

4 You'll get me a judgment, I suppose?

5 MR. MICKELSON: Yes, Your Honor.

6 MR. GROSSBART: Yeah, we'd like one.

7 THE COURT: Well, yeah, you need one to keep the
8 case going.

9 All right. Thanks.

10 MR. JOHNSON: When should we get you that judgment,
11 Your Honor?

12 THE COURT: Yeah, and thanks for expediting it as
13 much as you could and being gentlemen, good lawyers.

14 MR. JOHNSON: How soon will we need to get you the
15 judgment, Your Honor?

16 THE COURT: Say again?

17 Oh, you enter the judgment, don't you, or do you?

18 MR. GROSSBART: The clerk, probably?

19 THE CLERK: I will enter judgment.

20 MR. JOHNSON: You're going to enter the judgment?

21 THE CLERK: Yeah, I can enter it.

22 THE COURT: Yeah, that's right. She enters the
23 judgment.

24 MR. JOHNSON: I don't think you need a form from us.

25 THE COURT: No, I think if you're going to prepare a

1 bill of costs, you've got so many days under the rules.

2 MR. JOHNSON: Yeah.

3 MR. DAVIS: All right.

4 THE COURT: But that goes to the clerk, too, who
5 taxes it.

6 MR. JOHNSON: Okay.

7 THE COURT: And if there's a dispute on that, I'll
8 resolve it, but there shouldn't be a dispute. The rules are
9 simple about what you can tax and what you can't.

10 All right. Thank you.

11 (Counsel respond.)

12 (Proceedings were concluded at 16:26:46.)

13

14

15

16

17

18

19

20

21

22

23

24

25

VOLUME 9 REPORTER'S CERTIFICATE

I, JoAnn Corson Bacheller, a Registered Diplomat Reporter and Certified Realtime Reporter, certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to typewriting, a certified copy of this transcript will be filed electronically with the Court.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Billings, Montana this 27th day of April, 2010.

/s/ JoAnn Corson Bacheller

JoAnn Corson Bacheller
United States Court Reporter